Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1319

UNITED STATES OF AMERICA,

Petitioner,

—v.—

UMBERTO JOSE CHAVEZ, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

CR-71-406 SAW

THE UNITED STATES

vs.

UMBERTO JOSE CHAVEZ
aka PELON

IRENE CHAVEZ

JAMES FERNANDEZ

ANN FERNANDEZ

OLIVIA MIRAMONTES
aka OLIVIA MONTES

JESSE BUSTAMANTE

ARMANDO RAMIREZ
aka MANDO

CARMEN RAMIREZ

DELORES FERNANDEZ

GEORGE APODACA

MARGARET APODACA

VERNON BACA

FILEMON MIRAMONTES

PEDRO ARAUJO

21:173, 174 Conspiracy to Import and Distribute Heroin;

18:1952 Interstate Travel with the intent to promote a business Enterprise Involving Narcotics.

Three (3) Counts

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
1971		
May	6	Ord. Indictment filed, B/W to issue to the deft. (Pedro Araujo) bail $25,000.00, Summons to issue to all other defts. ret. 6/3/71 GBH
		1. Filed Indictment, Issued summons on all defts. Bench Warrant as to the deft (Pedro Araujo) Bail $25,000.00 GBH
Jul	9	18. Filed No of Mo for Bill of Particulars on 13 August 71 at 11:00 A.M.
	9	19. Filed Mo for discovery.
	9	20. Filed Mo for Supplemental Bill of Particulars.
	9	21. Filed Mo for supplemental Bill of Particulars as to Umberto Jose
	9	22. Filed Points and Auths in suppt of defts mo for discovery and Inspection
Jul	9	23. Filed No of Mo for discovery on 13 Aug 71 at 11:00 A.M.
	9	24. Filed ORD appointing counsel.
Jul	9	ORD aft hrg-defts Mo for discovery & Mo for bill of particulars ORD filed Govt response to mos to be filed by 8/6/71-case con't to 8/13 at 11:00 AM for plea and mos as to all defts.
Jul	29	27. Filed Govt's response to defts Mo for Discovery.
	29	28. Filed Govt'ts Mo and Memo for discovery.
	29	29. Filed Govt's response to Mo for Defts for bill of particulars.

DATE			PROCEEDINGS
1971			
Dec	15		ORD: defts Chavez, Chavez, Apodaca, Fernandez, Fernandez, Miramontes, Bustamante, Ramirez, Ramirez, Fernandez, Apodaca, Baca pres w/att. all defts Plead NOT Guilty, Ord, Disc to be completed 20 days before trial, all motions to be filed 2 weeks before hearing date, response 1 week before hearing date, Defts need not appear for motions, Ord: case set for July trial on 4/3/72 at 9:30, deft Olivia Miramontes to appear 12/16/71
1972			
Jan	11	60.	Filed ORD dismissing Indictment as to Filemon Miramontes.
Jan	28	64.	Filed No of mo and mo for discovery on 2-3-72 as to George Apodoca.
Feb	3		ORD aft hrg-Apodaca pres w/attny-defts mo for discovery granted—4-6-72 final day for hrg mos-case con't to 5-8-72 at 9:30 am for jr. trial. SAW
Feb	3	65.	Filed ORD granting mo for discovery of deft George Apodaca. SAW
Feb	11	66.	Filed pltfs memo of discovery.
Mar	2	78.	Filed ORD re matters of disc not stipulated to by all parties—all mos DENIED; Govt to provide agreed disc material no later than 20 days prior to trial; Defts' mo for Bill of Particulars is GRANTED as to requests 4, 5 & 6. All other requests are DENIED. —SAW
Mar	2	79.	Filed deft APODACA's applic for ord unsealing certain material for incl in Ct file
Mar	6	81.	Filed ORD for unsealing of docs & papers in possession of Clerk so they may be filed as part of record in this case —SAW

DATE			PROCEEDINGS
1972			
Mar	7	82.	Filed Application of Maurice K. Merten in supp of ord authorizing interception of wire communications of "Pelone" et al
		83.	Filed Application of M. K. Merten in supp of ord authorizing interception of wire communications of U. Chavez et al
		84.	Filed afdvt of Maurice K. Merten
		85.	Filed afdvt of Peter B. Niblo
		86.	Filed afdvt of Julius Beretta
Mar	22	87.	Filed ORD ext time to 4-27-72 for filing all pre-tr mos, responses by 5-4-72; hrg of pre-tr mos before SAW 5-11-72/2:15; Trial set for 5-30-72 before Judge FREY.
Apr	13	89.	Filed deft APODACA's not. & mo to suppress evid, 5-11-72/2:15 (w/supptg docs & exhibits attached)
Apr	27	90.	Filed mo by all defts to suppress evidence (w/pts & auths)
		91.	Filed deft FERNANDEZ (Dolores) not. & mo for suppl bill of particulars & for performance of stip discovery by pltf, 5-11-72/2:15
May	1	92.	Filed defts' not. & mo to suppress wiretap evidence, 5-11-72/2:15
May	2	93.	Filed afdvt of serv of deft's mo to suppress
May	3	94.	Filed pltf's mo for addtl time to file pre-tr mo
May	4	97.	Filed Govt Response to defts' mo to suppress evidence
		98.	Filed Govt's Opp to deft's mo to suppress
May	5	99.	Filed ORD: time for filing response to defts' mo to suppress is ext to 5-9-72 —SAW

DATE		PROCEEDINGS
1972		
May	9	100. Filed Pltf's Opp to defts' mo to suppress wiretap evidence
		101. Filed clerk's not. cont'g case from 5-11 to 5-18-72/2:15
May	11	102. Filed Reply to Opp of USA to defts' mo to suppress
May	12	104. Filed afdvt of serv of Reply to pltf's opp to mo to suppress
May	15	124. Filed Reply to Opp of USA to defts' mo to suppress (same as docket #1 but on legal size paper)
		125. Filed Traverse to Gov't Response to defts' mo to suppress
May	18	ORD: Mo to suppress wiretap evidence—GRANTED; Mo for Suppl Bill of Particulars —GRANTED; Mo for related case status of CR-72-217—GRANTED (CR-72-217 to trial CR-71-406) —SAW
May	31	131. Filed ORD suppressing wiretap evidence & fruits thereof —SAW
		132. Filed Memo & ORD: wiretap communications intercepted purs to ords of Ct dtd 2-18-71 & 2-25-71, & fruits thereof, are suppressed. —SAW
June	13	136. Filed pltf's Memo of Discovery (afdvts of Carlo Lo Presti & Phillip T. White attached)
June	15	137. Filed pltf's not. of appeal from ord suppressing evidence
June	26	Mailed not. to counsel & 9th CCA of filing appeal
July	5	138. Filed Designation of record on appeal.
July	17	MADE, MAILED Record on Appeal to 9th CCA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CR. 71-406-SAW

No. 5

[Filed Mar. 7, 1972, C. C. Evensen, Clerk]

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

APPLICATION

Maurice K. Merten, an Attorney of the Organized Crime and Racketeering Section, San Francisco Strike Force, United States Department of Justice, being duly sworn states:

1) This sworn application is submitted in support of an Order authorizing the interception of wire communications. This application has been submitted only after lengthy discussions concerning the necessity for such application with various officials of the Organized Crime and Racketeering Section, United States Department of Justice, Washington, D. C., together with Agents of the Bureau of Narcotics and Dangerous Drugs.

2) He is an "investigative or law enforcement officer —of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is—he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

3) Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, The Honorable Will Wilson, to authorize affiant to make this application for an Order authorizing the interception of wire com-

munications. This letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

4) This application seeks authorization to intercept wire communications of Umberto Jose Chavez, also known as "Pelone", Lionel Medina Costilla, also known as Danny Costilla, Jose Ybarra-Rivera, and others as yet unknown, concerning the offenses enumerated in Section 2516 of Title 18, United States Code; offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package, and a conspiracy to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704(a) and 7237(a) of Title 26, United States Code, which have been committed and are being committed by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown.

5) He has discussed all the circumstances of the above offenses with Special Agent Julius Beretta of the San Francisco, California, office of the Bureau of Narcotics and Dangerous Drugs, who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Julius Beretta (attached to this application as Exhibit B and incorporated by reference herein) which alleges facts therein in order to show that:

A. There is probable cause to believe that Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown have committed and are committing offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses in violation of Section 174, Title 21, United States Code, and Sections 4704(a) and 7237(a) of Title 26, United States Code.

B. There is probable cause to believe that the wire communications of Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, concerning these offenses will be obtained through their interception, authorization for which is herein applied. In particular, these wire communications will concern:

1. The placing of orders by Umberto Jose Chavez to Jose Ybarra-Rivera and others as yet unknown outside the United States for large quantities of heroin to be illegally imported into the United States.

2. The communications between Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown both inside and outside the United States, through which a system of couriers transporting heroin from the United States-Mexican border to Northern California is coordinated.

3. The communications between Umberto Jose Chavez and Lionel Medina Costilla, and others as yet unknown within the State of California, concerning the distribution to a large geographical area of Northern California, of large quantities of heroin illegally imported into the United States from Mexico.

C. Normal investigative procedures reasonably appear unlikely to succeed if tried.

D. There is probable cause to believe telephone 415-656-7173, subscribed to in the name of Umberto Jose Chavez and located at 220 Carmelita Place, Fremont, California, has been used and is being used by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, in connection with the offenses described in 5(A) above.

6) No other application has been made to any Judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facility, or place specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, are engaged in the commission of offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses in violation of Section 174, Title 21, United States Code, and Sections 4704(a) and 7237(a) of Title 26, United States Code, and that telephone number 415-656-7173, subscribed to in the name of Umberto Jose Chavez, and located at 220 Carmelita

Place, Fremont, California, has been used and is being used by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, in connection with the offenses described in 5(A) above, and that communications of Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, concerning these offenses will be intercepted to and from the above described telephone and that normal investigative procedures reasonably appear unlikely to succeed.

On the basis of the allegations contained in this application and upon the basis of the affidavit of Special Agent Julius Beretta, Bureau of Narcotics and Dangerous Drugs, which is attached hereto and made a part thereof, affiant requests this Court to issue an Order pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice, and Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury, to intercept wire communications to and from the above described telephone until communications are intercepted which reveal the manner in which Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others yet unknown, illegally import, receive, transport, conceal, distribute and sell narcotic drugs not in or from the original stamped package and conspire to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704(a) and 7237(a) of Title 26, United States Code, and which reveal the identity of their confederates, their places of operation and the nature of the conspiracy involved therein, for a period of twenty (20) days from the date of this Order, whichever is earlier.

The affiant also requests that the Court direct that the Pacific Telephone and Telegraph Company, a communications common carrier as defined in Section 2510(10) of Title 18, United States Code, shall forthwith furnish the applicant and the Bureau of Narcotics and Dangerous Drugs all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and

with a minimum of interference with the services that such carrier is according the persons whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Pacific Telephone and Telegraph Company to be compensated for by the applicant or the Bureau of Narcotics and Dangerous Drugs at the prevailing rates.

/s/ Maurice K. Merten
MAURICE K MERTEN
Attorney
Department of Justice
San Francisco, California

Subscribed and sworn before me this 17 day of February 1971

/s/ Oliver J. Carter
United States District Judge

Assistant Attorney General
Criminal Division

DEPARTMENT OF JUSTICE
Washington 20530

Feb. 18, 1971

Mr. Maurice K. Merten
Special Attorney
San Francisco Strike Force
San Francisco, California

Dear Mr. Merten:

This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, United States Department of the Treasury, to intercept wire communications to and from telephone number 415-656-7173, located at 220 Carmelita Place, Fremont, California, in connection with the investigation into possible violations of Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4704 and 7237, by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown.

I have reviewed your request and the facts and circumstances detailed therein and have determined that there exists probable cause to believe that Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown have committed, are committing, or are about to commit offenses enumerated in Section 2516 of Title 18, United States Code, to wit: violations of Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4704 and 7237. I have further determined that there exists probable cause to believe that the above persons make use of the described facility in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures reasonably appear to be unlikely to succeed if tried.

Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, United States Department of the Treasury, to intercept wire communications from the facility described above, for a period of twenty (20) days.

Sincerely,

/s/ Will Wilson
WILL WILSON
Assistant Attorney General

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 5

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

AFFIDAVIT IN SUPPORT OF APPLICATION

Julius Beretta, Special Agent, Bureau of Narcotics and Dangerous Drugs, San Francisco Office, United States Department of Justice, being duly sworn, states:

1) I am a Special Agent with the Bureau of Narcotics and Dangerous Drugs and have been so employed for two and one half years, during which I have been assigned to the San Francisco, California, Office of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. I am an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is—I am an officer of the United States who is authorized by law to conduct investigation of and to make arrests for offenses enumerated in Section 2516, Title 18, United States Code.

2) This affidavit seeks authorization to intercept wire communications to and from telephone number 415-656-7173, subscribed to in the name of Umberto Jose Chavez, and located at 220 Carmelita Place, Fremont, California, in connection with the commission of certain offenses enumerated in Section 2516 of Title 18, United States Code, that is offenses involving the importation, receipt, transportation, concealment, distribution, and sale of illegal narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses in violation of Section 174, Title 21, United States Code, and Sections 4704(a) of Title 26, United States Code.

3) I have participated in the investigation of possible violations of the Federal Drug Laws listed in paragraph (2) and committed by Umberto Jose Chavez, also known

as "Pelone", Lionel Medina Costilla, also known as Danny Costilla, Jose Ybarra-Rivera, and others as yet unknown. As a result of my personal participation in these investigations and from the reports made to me by other Special Agents of the Bureau of Narcotics and Dangerous Drugs and from other law enforcement officers, and their official reports, of Fremont, California, Union City, California, and elsewhere, I am familiar with all the circumstances of the offenses. On the basis of that familiarity, I alleged the facts contained in the following numbered paragraphs show that:

A. There is probable cause to believe that Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, have committed and are committing offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a), Title 26, United States Code.

B. There is probable cause to believe that wire communications of Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, concerning these offenses will be obtained through their interception, authorization for which is herein applied. In particular these wire communications will concern:

1. The placing of orders by Umberto Jose Chavez to Jose Ybarra-Rivera and others as yet unknown outside the United States, for large quantities of heroin to be illegally imported into the United States.

2. The communications between Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown both inside and outside the United States through which a system of couriers transporting heroin from the United States-Mexican border to Northern California is coordinated.

3. The communications between Umberto Jose Chavez, Lionel Medina Costilla, and others as yet unknown within the State of California, concerning the distribution, to a large geographical area of Northern California, of

large quantities of heroin, illegally imported into the United States from Mexico.

C. Normal investigative procedures reasonably appear unlikely to succeed if tried.

D. There is probable cause to believe telephone 415-656-7173, subscribed to in the name of Umberto Jose Chavez and located at 220 Carmelita Place, Fremont, California, has been used and is being used by Umberto Jose Chavez in connection with the offenses described in paragraph 3(A) above.

FACTS AND CIRCUMSTANCES

PROBABLE CAUSE TO BELIEVE THAT UMBERTO JOSE CHAVEZ IS USING TELEPHONE NUMBER 415-656-7173 IN CONNECTION WITH THE COMMISSION OF OFFENSES INVOLVING THE ILLEGAL IMPORTATION, RECEIPT, TRANSPORTATION, CONCEALMENT, DISTRIBUTION, AND SALE OF NARCOTIC DRUGS NOT IN OR FROM THE ORIGINAL STAMPED PACKAGE IN VIOLATION OF SECTION 174, TITLE 21, UNITED STATES CODE, AND SECTIONS 4704 (a) AND 7237 (a) OF TITLE 26, UNITED STATES CODE.

4) Umberto Jose Chavez, alias Pelone, alias Humberto Jose Chavez, alias Jose Umberto Chavez, alias Bob Chavez, was born February 27, 1936, in Encinitas, California and is a male of Mexican extraction. He is 5'9" tall, 185 pounds, black hair, brown eyes, black moustache, and walks with a pronounced limp. Chavez is further identified by FBI number 191 720 C, California CII number 1 010 524, Union City Police Department number I67-0794, and Fremont Police Department number 5765. Chavez has been known to the former Federal Bureau of Narcotics and present Bureau of Narcotics and Dangerous Drugs since April of 1963 as a major narcotics violator. On April 24, 1963, Chavez was arrested for possession of heroin for sale, possession of heroin, and possession of marijuana. On December 16, 1963 he was sentenced on the possession of heroin for sale and the pos-

session of marijuana charges, and received a sentence of nine months in the Alameda County jail, three years suspended State prison, and three years probation. On December 13, 1965, Chavez was arrested by local authorities for possession of marijuana. He received a sentence of 10 days in the Alameda County jail to be served on the week-ends for this offense. On April 26, 1968, Chavez was arrested by the Union City Police Department for possession of heroin for sale and furnishing marijuana to a minor. He pled guilty to furnishing marijuana to a minor and was sentenced March 3, 1968 to one year in the Alameda County jail, three years suspended State prison, and three years probation. The charge of possession of heroin for sale was dismissed against Chavez when a female associate pled guilty to the charge. Chavez was also arrested in 1966 and 1970 for failing to register as a narcotic offender at the international border of San Ysidro, California. Chavez resides with his wife Irene at 220 Carmelita Place, Fremont, California.

5) Lionel Medina Costilla, alias Danny Costilla, is a Mexican male, born February 16, 1941, in San Marcos, Texas. He is 5'6" tall, weighs 135 pounds, has a medium build, black hair and brown eyes. Costilla can further be identified by Union City Police Department number J 392463 and social security number 311-34-8075. Costilla lives at 33537 7th Street, Union City, California and is employed by the "B" Disposal Company, Fremont, California. On October 7, 1970, he was arrested for possession of heroin for sale in Union City and this case is still pending court action. At the time of his arrest, Costilla had in his possession approximately 18 ounces of heroin contained in "Trojan" brand rubber prophylactics.

6) Jose Ybarra-Rivera is a male of Mexican extraction, birth and citizenship. He is approximately 5'8" tall, 170 pounds, balding with gray hair, he is presently residing at 1594 Obregon, Culiacan, Sinaloa, Mexico.

7) Confidential informant number 1, a Mexican citizen and former resident of the Culiacan area, Sinaloa, has been providing me with information regarding criminal activities since October 1969. The information furnished by informant number 1 has in the past been

proven reliable and accurate and has been corroborated by my own independent investigations. On one occasion information furnished by informant number 1 resulted in the arrest and conviction of an individual for violation of the Federal Narcotics Laws. Informant number 1 advised me that he has in the past had personal contact with Jose Ybarra-Rivera in Culiacan, Sinaloa, Mexico, and that on January 18, 1971, he contacted Jose Ybarra-Rivera and discussed the purchase from him (Jose Ybarra-Rivera) of kilogram quantities of heroin. In this conversation Jose Ybarra-Rivera related that he could supply such quantities of heroin.

8) Rudolpho Ybarra-Rivera, also a resident of Culiacan, Sinaloa, Mexico, is the brother of Jose Ybarra-Rivera. On January 18, 1971, Joseph Baca, Assistant Regional Director, Region No. 14, advised me that on December 19, 1969, he interviewed David Romero-Perea, an individual on whom the Bureau of Narcotics and Dangerous Drugs files show an extensive narcotics record. During the course of this discussion, David Romero-Perea related that Rudolpho Ybarra-Rivera was his source of supply for narcotics. David Romero-Perea is presently a Federal fugitive.

9) Sgt. Stannard B. Jensen, Officer in Charge, Vice Control Section, Fremont Police Department, Fremont, California, advised me of the following:

A. In April of 1970 a Fremont, California pharmacy contacted him (Sgt. Jensen) and reported that a male Mexican was buying an unusually large amount of non-lubricated "Trojan" brand rubber prophylactics approximately every 10 days and that this pattern had been established since March, 1970.

B. When he (Sgt. Jensen) showed the pharmacy employees a number of photographs of different Mexican-American suspects, they immediately identified Umberto Jose Chavez as the purchaser they had reported.

C. From April to August of 1970 this pharmacy continued to report to him (Sgt. Jensen) each time Umberto Jose Chavez purchased rubber prophylactics, and as the investigation continued, the pharmacy employees reported that a second Mexican male, operating an automobile

with California license number YAY 355, often accompanied Chavez during these purchases. During this period this pharmacy reported that Chavez had purchased 1,152 rubber prophylactics.

10) It has been determined through records of the Department of Motor Vehicles, Sacramento, California, that California registration YAY 355 is registered in the name of Lionel Medina Costilla for a 1968 Dodge Station Wagon.

11) Sgt. Jensen further advised me that on January 12, 1971, he was contacted by another Fremont, California, pharmacy which reported that a male Mexican had, on that day, purchased 432 non-lubricated "Shiek" brand rubber prophylactics and 144 non-lubricated "Trojan" brand rubber prophylactics and that when he (Sgt. Jensen) showed the pharmacy employees photographs of Umberto Jose Chavez they identified Chavez as the purchaser of the rubber prophylactics.

12) Through my experiences as a Special Agent of the Bureau of Narcotics and Dangerous Drugs and my association with other Agents of the Bureau of Narcotics and Dangerous Drugs, I know that non-lubricated prophylactics are commonly used to package bulk heroin.

13) Sgt. Jensen, Officer in Charge, Vice Control Section, Fremont Police Department, Fremont, California, has also advised me that on October 20, 1970, he (Sgt. Jensen) was furnished information by confidential informant number 2 who in the past provided information which, when corroborated by an independent investigation by him (Sgt. Jensen) had proven accurate and reliable and resulted in the arrest of an individual on a felony narcotic charge, which case is still pending. Informant number 2 related that he (informant number 2) had known Umberto Jose Chavez for more than a year and they had had numerous conversations during the period July 1970 to August 1970 regarding Umberto Jose Chavez's illegal drug activities. During these conversations Umberto Jose Chavez related that he received 120 ounces of high grade heroin in approximately three week intervals, that the heroin is adulterated by him (Chavez) three times and is packaged in rubber prophy-

lactics, and that it is then distributed in the California cities of Tracy, Stockton, Sacramento, Oakland, and San Francisco.

14) On January 6, 1971, Detective Sgt. Kane, Union City Police Department, Union City, California, advised me that confidential informant number 3 had provided him with information regarding criminal activities which when verified by him (Detective Sgt. Kane) resulted in the arrest and conviction of an individual for burglary.

15) On January 14, 1971, I contacted Charles Foster, Under-Sheriff, Siskayou County, who was formerly employed by the Union City Police Department Union City, California. Under-Sheriff Foster told me that from 1966 to 1968, while he was a police officer for the Union City Police Department, informant number 3 had provided him with information on three different occasions which, when verified, was found to be true on each occasion and which aided in the arrest and conviction of three individuals; one on a felony narcotics charge, one for armed robbery, and one for a check violation.

16) On January 6, 1971, informant number 3 furnished me with the following information:

A. That he (informant number 3) had, over the past year, purchased heroin from Umberto Jose Chavez approximately 100 times and the last purchase he made was during the period December 20 to 31, 1970.

B. Each time he (informant number 3) purchased heroin from Chavez it was packaged in non-lubricated rubber prophylactics.

C. That he (informant number 3) would order the heroin by calling Umberto Jose Chavez at his (Chavez's) residence at Union City, California and the place and time of the transaction would then be set. When he (informant number 3) and Chavez would meet at the time and place, Chavez would often deliver the heroin immediately. If immediate delivery was not made, Chavez would drive him (informant number 3) around in order to avoid detection and, after a period of time, direct him (informant number 3) to a location where the heroin was hidden.

D. That in the early part of 1970 Umberto Jose Chavez showed him (informant number 3) what Chavez described as three kilograms of heroin which were in the rear of Chavez's automobile. The heroin was packaged in rubber prophylactics and nearly filled a grocery bag.

17) On January 15, 1971, Detective Sgt. Kane, Union City Police Department, Union City, California, advised me that he had, on that date, contacted informant number 3 and had been told by informant number 3 that the last time he (informant number 3) had purchased heroin from Chavez, he (informant number 3) had called Chavez at telephone number 489-0869, and that Chavez periodically had his telephone number changed.

18) From surveillance by Agents of the Bureau of Narcotics and Dangerous Drugs, Officers of the Union City and Fremont Police Departments, United States Postal Records, and records of the Pacific Telephone and Telegraph Company, San Francisco, California, it was determined that Umberto Jose Chavez and his wife Irene Chavez resided at 33642 7th Street, Union City, California up to approximately December 11, 1970. The telephone located at that residence and subscribed to in the name of Florentino Chavez was assigned the following numbers: 415-471-1193 changed July 13, 1970 to 415-471-4288, changed September 17, 1970 to 415-489-0869, changed January 4, 1971 to, and presently, 415-489-0505. On or about December 11, 1970, Chavez and his wife moved from 33642 7th Street, Union City, California, to 220 Carmelita Place, Fremont, California, but continued phone service at the Union City address. On December 18, 1970, service was initiated for telephone number 415-656-7173 subscribed in the name of Umberto Jose Chavez and located at 220 Carmelita Place, Fremont, California.

19) Surveillance by the various law enforcement agencies named in paragraph (18) above also determined that:

A. Umberto Jose Chavez and his wife Irene were the only adults living at 33642 7th Street, Union City, California.

B. As of the date of this affidavit the residence located at 33642 7th Street, Union City, California is vacant.

20) The telephone records maintained by the Pacific Telephone and Telegraph Company, San Jose, California, were examined relative to telephone number 415-471-1193, changed to 415-471-4288, changed to 415-489-0869, changed to and presently 415-489-0505 and telephone number 415-656-7173. These records for the period February 11, 1970 to February 5, 1971 (in the case of 415-489-0505) and December 18, 1970 to February 5, 1971 (in the case of 415-656-7173), reflect extensive telephone traffic from those numbers to Culiacan, Mexico and Tijuana, Mexico, and more than fifty collect calls from pay telephones at San Ysidro, Chula Vista, and San Diego, California to those numbers. In particular the toll records disclose:

A. The long distance telephone traffic over telephone number 415-656-7173, located at 220 Carmelita Place, Fremont, California, that telephone located in the new residence of Umberto Jose Chavez which began service December 18, 1970, is similar to and a continuation of the long distance telephone traffic previously carried on over telephone number 415-471-1193 changed to 415-471-4288, changed to 415-489-0869, and changed to and presently 415-489-0505 before Chavez changed residences.

B. Telephone 415-471-1193, changed to 415-471-4288, changed to 415-489-0869, changed to and presently 415-489-0505 is still in service but not presently being used to conduct long distance telephone traffic to Mexico.

C. Collect calls from unknown pay telephones in San Ysidro, Chula Vista, and San Diego, California to telephone 415-471-1193, changed to 415-489-4288, changed to 415-489-0869, changed to and presently 415-489-0505 were interspersed with calls from that telephone to Mexico, and that same pattern is continuing with telephone 415-656-7173.

D. From January 11, 1971 to February 5, 1971, in excess of 120 multi-message unit calls were placed from telephone 415-656-7173. Multi-message units reflect calls made to surrounding communities.

21) Attached hereto and made a part thereof are the following appendices which reflect a portion of the long distance telephone traffic between California and Mexico conducted over telephone 415-471-1193, changed to 415-471-4288, changed to 415-489-0869, changed to and presently 415-489-0505 and telephone 415-656-7173.

A. Appendix A-1, a chronological list of long distance telephone traffic between specific Mexican telephones and telephone number 415-471-1193, changed to 415-471-4288, changed to 415-489-0869, changed to and presently 415-489-0505, from February 11, 1970 to February 5, 1971.

B. Appendix B-1, a monthly summary of long distance telephone traffic between specific Mexican telephones and those telephones listed in paragraph 21(A) above from February 11, 1970 to February 5, 1971.

C. Appendix C-1, a summary of long distance calls between specific Mexican telephones and those telephones listed in paragraph 21 (A) above for the period February 11, 1970 through February 5, 1971.

D. D-1, a chronological list of collect calls from unknown pay telephones in San Ysidro, Chula Vista, and San Diego, California to those telephones listed in 21 (A) from February 9, 1970 to February 5, 1971.

E. Appendix A-2, a chronogolical list of long distance telephone traffic between specific Mexican telephones and telephone number 415-656-7173 from December 18, 1970 to February 5, 1971.

F. Appendix B-2, a monthly summary of long distance telephone traffic between specific Mexican telephones and telephone 415-656-7173 from December 18, 1970 to February 5, 1971.

G. Appendix C-2, a summary of long distance calls between specific Mexican telephones and telephone 415-656-7173 for the period December 18, 1970 to February 5, 1971.

H. D-2, a chronological list of collect calls from unknown pay telephones in San Ysidro, Chula Vista, and San Diego, California to telephone 415-656-7173 from December 18, 1970 to February 5, 1971.

22) The Mexican Telephone numbers have been identified as follows:

A. 903-385-5054 is subscribed to by the La Sonorita Grocer, Jose Vasquez Burel, Calle 9A, 776 TTE, Groc., East Alvert, Colonia Libertad, Tijuana.

B. 903-386-4640

903-386-4641 are both subscribed to by the Reno Motel, Dr. Longois Manoguin, owner, Camino Ensenada 500 ESQ. GOB. Lugo Davilla, Tijuana. On January 18, 1971, I contacted Joseph Baca, Assistant Regional Director, Region No. 14, Bureau of Narcotics and Dangerous Drugs, who advised me that from his previous assignment in the former Federal Bureau of Narcotics as a liason officer between that Bureau and the Mexican Federal Police, and his present position of Assistant Regional Director, he is familiar with the narcotics traffic conducted between the United States and Mexico. Mr. Baca told me that the Reno Motel is located a short distance outside of Tijuana, Mexico, and, in investigations he participated in, served as a meeting place for drug buyers awaiting shipments of drugs from the interior of Mexico.

C. 903-385-2267 is subscribed to by Dr. Septimo Mendez, 704 Bojas, C.P.T.O.Y.D. Mira, Tijuana.

D. 903-385-6208 is subscribed to by Maria De Jesus Navarez, Calle 4th Street, 494 Tijuana, Mexico. An examination of Bureau of Narcotics and Dangerous Drugs intelligence files indicates that this telephone number, then subscribed to by the same individual and located at the same address was used in 1962 by Francisco Campos, at that time considered by the former Federal Bureau of Narcotics to be the largest marijuana trafficker in Tijuana, Mexico.

E. 2-0382 is subscribed to by Jose Ybarra-Rivera, 1594 Obregon, Culican, Sinaloa, Mexico.

F. 2-1117 is subscribed to by the Hotel El Gran, 5th of February Street, Culiacan, Sinaloa, Mexico.

NORMAL INVESTIGATIVE PROCEDURES REASONABLY APPEAR UNLIKELY TO SUCCEED

23) Based on my knowledge and experience as a Special Agent of the Bureau of Narcotics and Dangerous

Drugs of narcotic cases, and association with other Special Agents who have conducted investigations of illegal narcotics traffic, normal investigative procedures appear unlikely to succeed in establishing:

A. That Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, are involved in illegal narcotic activities in violation of Federal Laws;

B. The full extent of this conspiracy to import and distribute illegal narcotics, that is, the identity of the co-conspirators, aiders, and abettors;

C. The hierarchy of this organization illegally importing narcotics from Mexico and distributing them in Northern California.

24) My experiences and the experiences of other Special Agents of the Bureau of Narcotics and Dangerous Drugs has shown that individuals dealing in large quantities of narcotics are particularly covert in their activities and wary of surveillance by State and Federal law enforcement personnel. Such dealers very rarely keep records, deal personally with a very few trusted individuals and isolate themselves from other individuals in the distribution organization. Through experience it has also been learned that individuals dealing in large quantities of narcotics frequently change telephone numbers to avoid detection and receive, store, and deliver narcotics at varying locations.

25) At this time there is no known undercover access to Umberto Jose Chavez or his organization. Confidential informants 2 and 3 referred to in this affidavit both report that Umberto Jose Chavez is extremely cautious and will not sell heroin to individuals who he has not known for a long period of time. These informants report that Umberto Jose Chavez has a reputation for furnishing bail and legal aid to confederates who are arrested and, therefore, he has minimized the pressures on those arrested to cooperate.

26) The confidential informants referred to in this affidavit have all refused to testify against Umberto Jose Chavez or the members of his organization because of fear for their personal safety.

27) All attempts to surveil Umberto Jose Chavez have met with little success. When driving in an automobile, Umberto Jose Chavez is constantly alert for surveillance and frequently squares blocks and makes u-turns in order to elude any tailing automobiles.

28) Detective Sgt. Jensen, Fremont Police Department, Fremont, California, reported to me that he had contacted Umberto Jose Chavez's probation officer, Mr. Skewis, Alameda County Probation Office, and that on two occasions Umberto Jose Chavez reported to Mr. Skewis that agents were following him (Umberto Jose Chavez) in automobiles of a particular model and color. On both of those occasions I was a participating agent in the surveillance of Umberto Jose Chavez and the descriptions of the automobiles were accurate.

29) For the reasons set out here and above, all normal avenues of investigation are closed and it is my belief that the only reasonable way to develop the necessary evidence of violations of Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4704 (a) and 7237 (a) by those persons named herein is to intercept wire communications to and from the telephone described in paragraph (2) above.

30) Therefore, based on the facts related above and my experience as a Special Agent of the Bureau of Narcotics and Dangerous Drugs, I believe and have reason to believe that probable cause allegations in the above paragraphs have been sustained.

31) No other application is known to have been made for authorization to intercept wire communications from telephone 415-656-7173, located at 220 Carmelita Place, Fremont, California.

32) The activities to be telephonically covered are believed to represent a continuing criminal conspiracy. It is further believed that communications concerning the offenses enumerated in paragraph 3 (A) will be conducted over the above described telephone. WHEREFORE because of the existence of the facts and underlying circumstances of the continuing investigation listed above in paragraphs (4) through (28), I submit that the probable cause as submitted in paragraph 3 (A), 3 (B), and

3 (D) exists and that the investigation as set forth above has failed to provide evidence necessary to sustain prosecution of all involved individuals for violations of the offenses enumerated in paragraph 3 (A) and that extensive normal investigative procedures reasonably appear unlikely to succeed. It is requested, therefore, that this Court issue an Order authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury, to intercept wire communications to and from the above described telephone until communications are intercepted which reveal the manner in which Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, import, receive, transport, conceal, distribute, and sell narcotics drugs not in or from the original stamped package in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a) of Title 26, United States Code, and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for twenty (20) days from the date of the Order, whichever is earlier.

JULIUS BERETTA
Special Agent
San Francisco, California
Office

Subscribed and sworn to before me this —— day of ————————, 1971.

————————
United States District Judge

APPENDIX A-1

Chronological list of long distance telephone traffic between telephone 415-471-1193, changed 415-471-4288, changed to 415-489-0869, changed to, and presently 415-489-0505, subscribed to in the name of Florentino Chavez and located at 33642 7th Street, Union City, California, and Mexico from February 11, 1970 to February 5, 1971.

Number 415-471-1193 In Service

DATE	AREA CALLED	NUMBER CALLED
February 11, 1970	Tijuana, Mexico	903-385-5054
February 11, 1970	Tijuana, Mexico	903-385-5054
February 12, 1970	Tijuana, Mexico	903-385-5054
February 12, 1970	Tijuana, Mexico	903-385-5054
February 12, 1970	Tijuana, Mexico	903-385-5054
March 12, 1970	Tijuana, Mexico	903-385-5054
March 12, 1970	Tijuana, Mexico	903-385-5054
March 15, 1970	Tijuana, Mexico	903-386-4640
March 16, 1970	Tijuana, Mexico	903-385-5054
March 16, 1970	Tijuana, Mexico	903-385-5054
March 16, 1970	Tijuana, Mexico	903-386-4640
March 19, 1970	Tijuana, Mexico	Collect Call From 903-386-4640
March 26, 1970	Tijuana, Mexico	903-385-5054
March 26, 1970	Tijuana, Mexico	903-385-5054
March 26, 1970	Tijuana, Mexico	903-385-5054
March 26, 1970	Tijuana, Mexico	903-385-5054
April 5, 1970	Tijuana, Mexico	903-385-5054
April 17, 1970	Tijuana, Mexico	903-386-4640
April 18, 1970	Tijuana, Mexico	903-386-4640
April 20, 1970	Tijuana, Mexico	903-386-4640
April 20, 1970	Tijuana, Mexico	903-386-4640
April 22, 1970	Tijuana, Mexico	903-386-4640
April 28, 1970	UNKNOWN	Collect Call From Mexico, Telephone Number Unknown
May 25, 1970	Tijuana, Mexico	903-386-4640
May 25, 1970	Tijuana, Mexico	903-386-4640
May 26, 1970	Tijuana, Mexico	903-386-4640
May 28, 1970	Tijuana, Mexico	903-386-4640
May 28, 1970	Tijuana, Mexico	903-386-4640

DATE	AREA CALLED	NUMBER CALLED
June 9, 1970	Tijuana, Mexico	903-386-4640
June 9, 1970	Tijuana, Mexico	903-386-4640
June 9, 1970	Culiacan, Mexico	2-0382
June 12, 1970	Tijuana, Mexico	903-386-4640
June 16, 1970	Tijuana, Mexico	903-386-4640
June 19, 1970	Tijuana, Mexico	903-386-4640
June 25, 1970	Tijuana, Mexico	903-386-4640
June 25, 1970	Tijuana, Mexico	Collect Call From 903-385-5054
July 2, 1970	Tijuana, Mexico	903-385-5054
July 2, 1970	Tijuana, Mexico	903-385-5054
July 2, 1970	Tijuana, Mexico	903-385-5054
July 2, 1970	Tijuana, Mexico	903-385-5054
July 2, 1970	Tijuana, Mexico	Collect Call From 903-385-2267
July 12, 1970	Tijuana, Mexico	Collect Call From 903-385-2267
Number 415-471-1193 Changed to 415-571-4288 on July 13, 1970		
July 13, 1970	Tijuana, Mexico	903-385-5054
July 13, 1970	Tijuana, Mexico	903-385-5054
July 13, 1970	Tijuana, Mexico	903-385-5054
July 14, 1970	Tijuana, Mexico	903-386-4640
July 16, 1970	Tijuana, Mexico	Collect Call From 903-386-4640
July 19, 1970	Tijuana, Mexico	903-386-4640
July 23, 1970	Tijuana, Mexico	903-386-4640
July 23, 1970	Tijuana, Mexico	Collect Call From 903-386-4640
July 24, 1970	Tijuana, Mexico	903-386-4640
July 24, 1970	Tijuana, Mexico	903-386-4640
July 25, 1970	Tijuana, Mexico	903-386-4640
July 25, 1970	Tijuana, Mexico	Collect Call From 903-386-4640
July 26, 1970	Tijuana, Mexico	903-386-4640
August 6, 1970	Tijuana, Mexico	903-385-5054
August 6, 1970	Tijuana, Mexico	903-385-5054
August 6, 1970	Tijuana, Mexico	903-385-5054
August 6, 1970	Tijuana, Mexico	903-385-5054
August 6, 1970	Tijuana, Mexico	903-385-5054
August 6, 1970	Tijuana, Mexico	903-385-5054
August 12, 1970	Tijuana, Mexico	903-386-4640
August 12, 1970	Tijuana, Mexico	903-386-4640
August 12, 1970	Tijuana, Mexico	903-386-4640
August 12, 1970	Tijuana, Mexico	903-386-4640
August 12, 1970	Culiacan Mexico	2-0382
August 13, 1970	Tijuana, Mexico	903-386-4640

DATE	AREA CALLED	NUMBER CALLED
August 26, 1970	Tijuana, Mexico	903-386-4640
August 27, 1970	Tijuana, Mexico	903-386-4640
September 6, 1970	Tijuana, Mexico	903-386-4640
September 16, 1970	Tijuana, Mexico	903-386-4640
Number 415-471-4288 Changed to 415-489-0869 on September 17, 1970		
September 17, 1970	Tijuana, Mexico	903-386-4640
September 20, 1970	Tijuana, Mexico	Collect Call From 903-386-4640
September 30, 1970	Culiacan, Mexico	2-1117
October 1, 1970	Tijuana, Mexico	903-386-4640
October 2, 1970	Tijuana, Mexico	903-386-4640
October 2, 1970	Culiacan, Mexico	2-1117
October 2, 1970	Culiacan, Mexico	2-1117
October 7, 1970	Tijuana, Mexico	903-386-4640
October 7, 1970	Tijuana, Mexico	903-386-4640
October 18, 1970	Tijuana, Mexico	903-385-6208
October 20, 1970	Tijuana, Mexico	903-385-6208
October 20, 1970	Tijuana, Mexico	903-386-4640
October 23, 1970	Tijuana, Mexico	903-385-6208
October 24, 1970	Tijuana, Mexico	903-386-4640
October 25, 1970	Tijuana, Mexico	Collect Call From 903-386-4640
October 27, 1970	Tijuana, Mexico	903-386-4640
November 6, 1970	Tijuana, Mexico	903-386-4640
November 7, 1970	Culiacan, Mexico	2-0382
November 8, 1970	Culiacan, Mexico	Collect Call From 2-1117
November 9, 1970	Tijuana, Mexico	903-386-4640
November 9, 1970	Tijuana, Mexico	903-386-4640
November 10, 1970	Tijuana, Mexico	903-386-4640
November 10, 1970	Tijuana, Mexico	903-386-4640
November 10, 1970	Tijuana, Mexico	903-386-4640
November 10, 1970	Tijuana, Mexico	903-386-4640
November 14, 1970	Culiacan, Mexico	2-1117
November 16, 1970	Culiacan, Mexico	2-0382
November 17, 1970	Culiacan, Mexico	2-1117
November 18, 1970	Tijuana, Mexico	903-386-4640
November 19, 1970	Tijuana, Mexico	Collect Call From 903-386-4641
November 19, 1970	Tijuana, Mexico	903-386-4641
November 19, 1970	Tijuana, Mexico	903-386-4641
November 20, 1970	Tijuana, Mexico	903-386-4641
November 27, 1970	Culiacan, Mexico	2-0382
November 28, 1970	Culiacan, Mexico	2-0382

DATE	AREA CALLED	NUMBER CALLED
December 1, 1970	Tijuana, Mexico	903-386-4641
December 1, 1970	Tijuana, Mexico	903-386-4641
December 1, 1970	Culiacan, Mexico	2-0382
December 2, 1970	Tijuana, Mexico	903-386-4641
December 2, 1970	Tijuana, Mexico	903-386-4641
December 3, 1970	Tijuana, Mexico	903-386-4641
December 3, 1970	Tijuana, Mexico	903-386-4641
December 4, 1970	Tijuana, Mexico	903-386-4641
December 4, 1970	Tijuana, Mexico	903-386-4641
December 6, 1970	Tijuana, Mexico	903-386-4641
December 6, 1970	Culiacan, Mexico	2-0382
December 7, 1970	Culiacan, Mexico	2-0382
December 15, 1970	Culiacan, Mexico	2-0382
December 16, 1970	Tijuana, Mexico	903-386-4641
Number 415-489-0869 Changed to 415-489-0505 January 1, 1971		
January 7, 1971	Tijuana, Mexico	903-386-4641
January 7, 1971	Tijuana, Mexico	903-386-4641

APPENDIX A-2

Chronological list of long distance telephone traffic between telephone 415-656-7173, subscribed to in the name of Umberto Jose Chavez and located at 220 Carmelita Place, Fremont, California, and Mexico, for the period December 18, 1970 to February 5, 1971.

Number 415-656-7173 In Service as of December 18, 1970

DATE	AREA CALLED	NUMBER CALLED
December 18, 1970	Tijuana, Mexico	903-386-4641
December 18, 1970	Tijuana, Mexico	903-386-4641
December 29, 1970	Tijuana, Mexico	903-385-6208 (Called From Union City, Billed To 415-656-7173)
January 7, 1971	Tijuana, Mexico	903-3864641
January 7, 1970	Culiacan, Mexico	2-0382
January 9, 1971	Tijuana, Mexico	903-386-4641
January 10, 1971	Tijuana, Mexico	903-386-4641
January 10, 1971	Tijuana, Mexico	903-386-4641
January 27, 1971	Tijuana, Mexico	903-386-4641
January 27, 1971	Tijuana, Mexico	903-386-4641
January 28, 1971	Tijuana, Mexico	903-386-4641
January 28, 1971	Tijuana, Mexico	903-386-4641
January 29, 1971	Tijuana, Mexico	903-386-4641
January 20, 1971	Tijuana, Mexico	903-386-4641
January 30, 1971	Tijuana, Mexico	903-386-4641

APPENDIX B-1

Monthly summary of long distance telephone traffic between telephone 415-471-1193, changed to 415-471-4288, changed to 415-489-0869, changed to, and presently 415-489-0505, subscribed to in the name of Florentino Chavez and located at 33642 7th Street, Union City, California, and Mexico

February 1970 —5 calls to Tijuana, Mexico 903-385-5054

March 1970 —8 calls to Tijuana, Mexico 903-385-5054
2 calls to Tijuana, Mexico 903-386-4640
1 call collect from Tijuana, Mexico 903-386-4640
1 call to Tijuana, Mexico 903-385-5054

April 1970 —1 call to Tijuana, Mexico 903-385-5054
5 calls to Tijuana, Mexico 903-386-4640
1 call collect from Mexico

May 1970 —5 calls to Tijuana, Mexico 903-386-4640

June 1970 —6 calls to Tijuana, Mexico 903-386-4640
1 call to Culiacan, Mexico 2-0382
1 call collect from Tijuana, Mexico 903-385-5054

July 1970 —7 calls to Tijuana, Mexico 903-385-5054
7 calls to Tijuana, Mexico 903-386-4640
8 calls collect from Tijuana, Mexico 903-386-4640
2 calls collect from Tijuana, Mexico 903-385-2267

August 1970 —7 calls to Tijuana, Mexico 903-386-4640
6 calls to Tijuana, Mexico 903-385-5054
1 call to Culiacan, Mexico 2-0382

September 1970—8 calls to Tijuana, Mexico 903-386-4640
1 call to Culiacan, Mexico 2-1117
1 call collect from Tijuana, Mexico 903-386-4640

October 1970 —7 calls to Tijuana, Mexico 903-386-4640
8 calls to Tijuana, Mexico 903-385-6208
2 calls to Culiacan, Mexico 2-1117
1 call collect from Tijuana, Mexico 903-386-4640

November 1970 —8 calls to Tijuana, Mexico 903-386-4640
4 calls to Culiacan, Mexico 2-0382
8 calls to Tijuana, Mexico 903-386-4641
2 calls to Culiacan, Mexico 2-1117
1 call collect from Tijuana, Mexico 903-386-4641
1 call collect from Culiacan, Mexico 2-1117

December 1970 —10 calls to Tijuana, Mexico 903-386-4641
4 calls to Culiacan, Mexico 2-0382

January 1971 —2 calls to Tijuana, Mexico 903-386-4641

APPENDIX B-2

Monthly summary of specific long distance telephone traffic between telephone 415-656-7173, subscribed to in the name of Umberto Jose Chavez, and located at 220 Carmelita Place, Fremont, California, and Mexico.

December 1970 —2 calls to Tijuana, Mexico 903-386-4641
1 call to Tijuana, Mexico 903-385-6208
(Called from Union City, California, billed to 415-656-7173)

January 1971 —11 calls to Tijuana, Mexico 903-386-4641
1 call to Culiacan, Mexico 2-0382

APPENDIX C-1

Summary of long distance telephone traffic between telephone 415-471-1193, changed to 415-471-4288, changed to 415-489-0869, changed to, and presently 415-489-0505, subscribed to in the name of Florentino Chavez, located at 33642 7th Street, Union City, California, and Mexico, for the period February 11, 1970 to February 5, 1971.

903-385-5054	—27 telephone calls to Tijuana, Mexico 903-385-5054
	1 collect telephone call from Tijuana, Mexico 903-385-5054
903-386-4640	—50 telephone calls to Tijuana, Mexico 903-386-4640
	6 collect telephone calls from Tijuana, Mexico 903-386-4640
903-386-4641	—15 telephone calls to Tijuana, Mexico 903-386-4641
	1 collect telephone call from Tijuana, Mexico 903-386-4641
903-385-2267	—2 collect telephone calls from Tijuana, Mexico 903-385-2267
2-0382	—10 telephone calls to Culiacan, Mexico 2-0382
2-1117	—5 telephone calls to Culiacan, Mexico 2-1117
	1 collect telephone call from Culiacan, Mexico 2-1117
903-385-6208	—3 telephone calls to Tijuana, Mexico 903-385-6208

Unknown Number—1 collect telephone call from Mexico

APPENDIX C-2

Summary of long distance telephone traffic between telephone 415-656-7173, subscribed to in the name of Umberto Jose Chavez and located at 220 Carmelita Place, Fremont, California, and Mexico, for the period December 18, 1970 to February 5, 1971.

903-386-4641	—13 telephone calls to Tijuana, Mexico 903-386-4641
2-0382	—1 telephone call to Culiacan, Mexico 2-0382
903-385-6208	—1 telephone call to Tijuana, Mexico 903-385-6208 (Called from Union City, California, billed to 415-656-7173)

APPENDIX D-1

Chronological list of collect telephone calls from unknown pay telephones in San Ysidro, Chula Vista and San Diego, California, to telephone 415-471-1193, changed to 415-471-4288, changed to and presently 415-489-0505, subscribed to in the name of Florentino Chavez, and located at 33642 7th Street, Union City, California, for the period February 9, 1970 to February 5, 1971.

Number 415-471-1193 In Service

Date	Collect Telephone Call Received From
February 9, 1970	San Ysidro, California
February 11,1970	San Ysidro, California
February 14, 1970	San Ysidro, California
February 16, 1970	San Ysidro, California
April 21, 1971	San Ysidro, California
April 22, 1970	San Ysidro, California
April 27, 1970	San Ysidro, California
May 15, 1970	San Ysidro, California
May 15, 1970	San Ysidro, California
June 1, 1970	San Ysidro, California
June 11, 1970	San Ysidro, California
June 18, 1970	San Ysidro, California
June 20, 1970	San Ysidro, California
June 25, 1970	San Ysidro, California
July 1, 1970	San Ysidro, California
July 4, 1970	Chula Vista, California
July 10, 1970	San Ysidro, California
July 11, 1970	San Ysidro, California

Number 415-471-1193 Changed to 415-471-4288 on July 13, 1970

July 26, 1970	Chula Vista, California
July 26, 1970	Chula Vista, California
July 27, 1970	San Ysidro, California

Date	Collect Telephone Call Received From
August 3, 1970	San Ysidro, California
August 7, 1970	Chula Vista, California
August 10, 1970	San Ysidro, California
August 14, 1970	Chula Vista, California
August 17, 1970	San Ysidro, California
August 19, 1970	San Ysidro, California
August 27, 1970	San Ysidro, California
August 28, 1970	Chula Vista, California
August 31, 1970	San Ysidro, California
September 11, 1970	Chula Vista, California

Number 415-471-4288 Changed to 415-489-0869 on September 17, 1970

September 24, 1970	San Ysidro, California
October 1, 1970	San Ysidro, California
October 1, 1970	San Ysidro, California
October 7, 1970	Chula Vista, California
October 13, 1970	San Ysidro, California
October 13, 1970	San Diego, California
October 14, 1970	San Ysidro, California
October 14, 1970	San Ysidro, California
October 14, 1970	San Ysidro, California
October 28, 1970	San Ysidro, California
October 31, 1970	San Ysidro, California
November 4, 1970	Chula Vista, California
November 6, 1970	San Ysidro, California
November 7, 1970	San Ysidro, California
November 10, 1970	San Ysidro, California
November 16, 1970	San Ysidro, California
December 5, 1970	San Ysidro, California

Number 415-489-0869 Changed to 415-489-5050 on January 4, 1971

APPENDIX D-2

Chronological list of collect telephone calls from unknown pay telephones in San Ysidro, Chula Vista and San Diego, California, to telephone 415-656-7173, subscribed to in the name of Umberto Jose Chazev, and located at 220 Carmelita Place, Fremont, California, for the period December 18, 1970, to February 5, 1971.

Number 415-656-7173 In Service as of December 18, 1970

Date	Collect Telephone Call Received From
January 1, 1971	San Ysidro, California
January 4, 1971	San Ysidro, California
January 6, 1971	San Ysidro, California
January 11, 1971	San Ysidro, California
January 11, 1971	San Ysidro, California
January 14, 1971	San Ysidro, California
January 16, 1971	San Ysidro, California
January 25, 1971	San Ysidro, California
January 29, 1971	San Ysidro, California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 5

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury.

Application under oath having been made before me by Maurice K. Merten, an attorney of the Organized Crime and Racketeering Section of the United States Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2510 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

A. There is probable cause to believe that Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, have committed and are committing offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704(a) and 7237(a) of Title 26, United States Code.

B. There is probable cause to believe that wire communications of Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, concerning these offenses will be obtained through their interception, authorization for which is herein applied. In particular, these wire communications will concern:

1. The placing of orders by Umberto Jose Chavez to Jose Ybarra-Rivera, and others as yet unknown outside the United States, for large quantities of heroin to be illegally imported into the United States.

2. The communications between Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown both inside and outside the United States, through which a system of couriers transporting heroin from the United States-Mexican border to Northern California is coordinated.

3. The communications between Umberto Jose Chavez and Lionel Medina Costilla, and others as yet unknown within the State of California, concerning the distribution, to a large geographical area of Northern California, of large quantities of heroin, illegally imported into the United States from Mexico.

C. Normal investigative procedures reasonably appear unlikely to succeed if tried.

D. There is probable cause to believe telephone 415-656-7173, subscribed to in the name of Umberto Jose Chavez, and located at 220 Carmelita Place, Fremont, California, has been used and is being used by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, in connection with the offenses described in paragraph (A) above.

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury, are authorized, pursuant to the application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to:

1) Intercept wire communications of Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and

others as yet unknown, concerning the above described offenses to and from telephone 415-656-7173, subscribed to in the name of Umberto Jose Chavez and located at 220 Carmelita Place, Fremont, California.

2) Not automatically terminate the interception when the described type of communications sought are first obtained, but that this authority to intercept continue for a reasonable time thereafter, not to exceed a total of twenty (20) days from the date of the Order, which will reveal the manner in which Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Riviera, and others as yet unknown, illegally import, receive, transport, conceal, distribute, and sell narcotic drugs not in or from the original stamped package, and conspire to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704(a) and 7237(a) of Title 26, United States Code, and which will reveal the identity of their confederates, their places of operation, and the nature of the conspiracy involved therein.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after the signing of this Order, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 110 of Title 18, United States Code, and shall terminate upon obtainment of the authorized objective, or in any event, at the end of twenty (20) days from the date of this Order.

It is further ordered, upon request of the applicant, that the Pacific Telephone and Telegraph Company, a communications common carrier as defined in Section 2510(10) of Title 18, United States Code, shall forthwith furnish the Applicant and the Bureau of Narcotics and Dangerous Drugs all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the persons whose communications are to be intercepted. The furnishing of such facilities or technical assistance by

the Pacific Telephone and Telegraph Company to be compensated for by the Applicant or the Bureau of Narcotics and Dangerous Drugs, Department of Justice, at the prevailing rates.

PROVIDING ALSO, that Maurice K. Merten shall provide the Court with a report on the 5th, 10th, and 15th days following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception:

/s/ Oliver J. Carter
United States District Judge

This 18 day of February, 1971 at 10:10 O'Clock A.M.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF PEN REGISTERS OR TOUCH TONE DECODERS

ORDER AUTHORIZING THE USE OF PEN REGISTERS OR TOUCH TONE DECODERS

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury.

Affidavit under oath having been made before me by Julius Beretta, Special Agent of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, and full consideration having been given to the matters set forth therein, the Court finds:

A. There is probable cause to believe that Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown have committed and are committing offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704(a) and 7237(a) of Title 26, United States Code.

B. There is probable cause to believe telephone number 415-656-7173, subscribed to in the name of Umberto Jose Chavez, and located at 220 Carmelita Place, Fremont, California has been used and is being used by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown, in connection with the offenses descibed in (A)

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury, are authorized to:

A. Install mechanical decices on telephone number 415-656-7173, subscribed to in the name of Umberto Jose Chavez, and located at 220 Carmelita Place, Fremont, California, which will reveal the telephone numbers of all outgoing calls dialed from the above described telephone.

B. Continue use of such mechanical devices in operation until the telephone numbers of all outgoing calls dialed lead to the identities of the confederates of the conspiracy involving the importation and distribution of illegal narcotics, and their places of operation, for a period of twenty (20) days from the date of this Order, whichever is earlier.

PROVIDING THAT, this authorization to install and operate the above described mechanical devices must terminate upon attainment of the authorized objective or, in the event, at the end of twenty (20) days from the date of this Order.

/s/ Oliver J. Carter
United States District Judge

February 18, 1971
DATE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 6

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

APPLICATION

Maurice K. Merten, an Attorney of the Organized Crime and Racketeering Section, San Francisco Strike Force, United States Department of Justice, being duly sworn states:

1) This sworn application is submitted in support of an Order authorizing the interception of wire communications. This application has been submitted only after lengthy discussions concerning the necessity for such application with various officials of the Organized Crime and Racketeering Section, United States Department of Justice, Washington, D. C., together with Agents of the Bureau of Narcotics and Dangerous Drugs.

2) He is an "investigative or law enforcement officer —of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code, that is—he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

3) Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, The Honorable Will Wilson, to authorize affiant to make this application for an Order authorizing the interception of wire communications. This letter or authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

4) This application seeks authorization to intercept wire communications of "Pelone", "Jim", "Jessee", "Mondo", "Olivia", and others as yet unknown, concerning the offenses enumerated in Section 2516 of Title 18, United States Code; offenses involving the illegal importation, receipt, transportation, concealment, distribution and sale of narcotic drugs not in or from the original stamped package, and a conspiracy to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a) of Title 26, United States Code, which have been committed and are being committed by "Pelone", "Jim", "Jessee", and "Mondo", "Olivia", and others as yet unknown.

5) He has discussed all the circumstances of the above offenses with Special Agent Julius Beretta of the San Francisco, California, office of the Bureau of Narcotics and Dangerous Drugs, who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Julius Beretta (attached to this application as Exhibit B and incorporated by reference herein) which alleges facts therein in order to show that:

a. There is probable cause to believe that "Pelone", "Jim", "Jessee", "Mondo", "Olivia, and others as yet unknown have committed and are committing offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a) of Title 26, United States Code.

b. There is probable cause to believe that the wire communications of "Pelone", "Jim", "Jessee", "Mondo", "Olivia", and others as yet unknown, concerning these offenses will be obtained through their interception, authorization for which is herein applied. In particular, these wire communications will concern:

(1) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the availability of heroin illegally

imported from Mexico to the United States and transported to Northern California.

(2) The communications between "Pelone", "Jim", "Jessee", "Mondo", "Olivia", and others as yet unknown relative to the overall operation of an organization illegally importing and distributing heroin.

(3) The communications between "Pelone", "Jim", "Jesse", "Mondo", Olivia", and others as yet unknown concerning the method and scope of distribution of heroin throughout Northern California.

(4) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the place of storage of heroin illegally imported into the United States from Mexico.

(5) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the number and identity of the sellers of the heroin illegally imported into the United States by these individuals and others.

c. Normal investigative procedures reasonably appear unlikely to succeed.

d. There is probable cause to believe that telephone number 415-471-7260 subscribed to in the name of James Fernandez and located at 1345 G Street, Union City, California, has been used and is being used by "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, in connection with the offenses described in 5(a) above.

6) By Court Order dated February 18, 1971, the Honorable Oliver J. Carter, Chief Judge, United States Department of Justice, Northern District of California, authorized the interception of wire communications of Umberto Jose Chavez, Lionel Medina Costilla, and Jose Ybarra-Rivera, from telephone number 415-656-7173 for a maximum of twenty (20) days. Wire communications have been intercepted from the above-mentioned telephone from February 18, 1971 up to, and including, the date of this application. Other than the application made in support of the Order referred to in this paragraph, no other application has been made to any Judge for authorization to intercept or for approval of the intercep-

tion of wire or oral communications involving the same persons, facility or place specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, are engaged in the commission of offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a) of Title 26, United States Code, and that telephone number 415-471-7260, subscribed to in the name of James Fernandez and located at 1345 G Street, Union City, California, has been used and is being used by "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, in connection with the offenses described in 5 (a) above, and that communications of "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, concerning these offenses will be intercepted to and from the above described telephone and that normal investigative procedures reasonably appear unlikely to succeed.

On the basis of the allegations contained in this application and upon the basis of the affidavit of Special Agent Julius Beretta, Bureau of Narcotics and Dangerous Drugs, which is attached hereto and made a part thereof, affiant requests this Court to issue an Order pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice, and Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury, to intercept wire communications to and from the above described telephone until communications are intercepted which reveal the manner in which "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others yet unknown, illegally import, receive, transport, conceal, distribute, and sell narcotic drugs not in or from the original stamped package and conspire to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704 (a)

and 7237 (a) of Title 26, United States Code, and which reveal the identity of their confederates, their places of operation and the nature of the conspiracy involved therein, for a period of twenty (20) days from the date of this Order, whichever is earlier.

The affiant also requests that the Court direct that the Pacific Telephone and Telegraph Company, a communications common carrier as defined in Section 2510 (10) of Title 18, United States Code, shall forthwith furnish the applicant and the Bureau of Narcotics and Dangerous Drugs all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the persons whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Pacific Telephone and Telegraph Company to be compensated for by the applicant or the Bureau of Narcotics and Dangerous Drugs at the prevailing rates.

MAURICE K. MERTEN
Attorney
Department of Justice
San Francisco, California

Subscribed and sworn before me this day of , 1971.

United States District Judge

Assistant Attorney General
Criminal Division

DEPARTMENT OF JUSTICE
Washington 20530

Feb. 25, 1971

Mr. Maurice Merten
Special Attorney
San Francisco Strike Force
San Francisco, California

Dear Mr. Merten:

This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Federal Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, United States Department of the Treasury, to intercept wire communications to and from telephone number 415-471-7260, located at 1345 G Street, Union City, California, in connection with the investigation into possible violations of Sections 174, 4704(a) and 7237(a) of Titles 21 and 26, respectively, United States Code, by persons identified only as "Pelone," "Jim," "Jesse," "Mondo," "Olivia" and others as yet unknown.

I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that persons identified only as "Pelone," "Jim," "Jesse," "Mondo," "Olivia" and others as yet unknown have committed, are committing, or are about to commit offenses enumerated in Section 2516 of Title 18, United States Code, to wit: violations of Sections 174, 4704(a) and 7237(a), of Titles 21 and 26, respectively, United States Code. I have further determined that there exists probable cause to believe that the above persons make use of the described facility in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that nor-

mal investigative procedures reasonably appear to be unlikely to succeed if tried.

Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, United States Department of the Treasury, to intercept wire communications from the facility described above, for a period of twenty (20) days.

Sincerely,

/s/ Will Wilson
WILL WILSON
Assistant Attorney General

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 6

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

AFFIDAVIT IN SUPPORT OF APPLICATION

Julius Beretta, Special Agent, San Francisco Office, Bureau of Narcotics and Dangerous Drugs, Department of Justice, being duly sworn, states:

1. I am a Special Agent of the Bureau of Narcotics and Dangerous Drugs. I have been so employed for two and one half years and have been assigned to the Bureau of Narcotics and Dangerous Drugs, San Francisco, California, Office, for that same period. I am an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code, that is—I am an officer of the United States who is authorized by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516, Title 18, United States Code.

2. This affidavit seeks authorization to intercept wire communications to and from telephone number 415-471-7260 subscribed to in the name of James Fernandez, 1345 G Street, Union City, California, in connection with the commission of certain offenses enumerated by Section 2516 of Title 18, United States Code, that is, offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a) of Title 26, United States Code, which have been committed and are being committed by the individuals known as "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown.

3. By Court Order dated February 18, 1971, the Honorable Oliver J. Carter, Chief Judge, United States Department of Justice, Northern District of California, authorized the interception of wire communications of Umberto Jose Chavez, Lionel Medina Costilla, and Jose Ybarra-Rivera, from telephone number 415-656-7173 for a maximum period of twenty (20) days. Wire communications have been intercepted from the above-mentioned telephone during the period February 18, 1971 up to and including the date of this affidavit. Other than the application made in support of the Order referred to in this paragraph, no other application has been made to any Judge for authorization to intercept or for approval of the interception of wire or oral communications involving any of the same persons, facility, or place specified herein. Attached hereto as Exhibit A and made a part thereof is the affidavit made in support of the Order authorizing the interception of wire communications from telephone 415-656-7173 referred to above. As a result of my personal participation in the implementation of Judge Carter's order of February 18, 1971, and my reference to logs of the interceptions made pursuant to that order, I am familiar with all of the circumstances of the offenses. On the basis of that familiarity, I allege the following paragraphs show that:

(a) There is probable cause to believe that persons identified only as "Pelone", "Jim", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, have committed and are committing offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a) of Title 26, United States Code.

(b) There is probable cause to believe that wire communications of the individuals known only as "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, concerning these offenses will be obtained through their interception, authorization

for which is herein applied. In particular, these wire communications will concern:

(1) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the availability of heroin illegally imported from Mexico to the United States and transported to Northern California.

(2) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown relative to the overall operation of an organization illegally importing and distributing heroin.

(3) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the method and scope of distribution of heroin throughout Northern California.

(4) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the place of storage of heroin illegally imported into the United States from Mexico.

(5) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the number and identity of the sellers of the heroin illegally imported into the United States by these individuals and others.

(c) Normal investigative procedures reasonably appear unlikely to succeed.

(d) There is probable cause to believe that telephone number 415-471-7260 subscribed to in the name of James Fernandez and located at 1345 G Street, Union City, California, has been used and is being used by "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, in connection with the offenses described in (a) above.

FACTS AND CIRCUMSTANCES

PROBABLE CAUSE TO BELIEVE THAT "JIM" IS UTILIZING TELEPHONE NUMBER 415-471-7260 IN CONNECTION WITH COMMISSION OF OFFENSES INVOLVING THE ILLEGAL IMPORTATION, RECEIPT, TRANSPORTATION, CONCEALMENT, DISTRIBUTION, AND SALE OF NARCOTIC DRUGS NOT IN OR FROM THE ORIGINAL STAMPED PACKAGE IN VIOLATION OF SECTION 174, TITLE 21, UNITED STATES CODE AND SECTIONS 4704 (a) AND 7237 (a) OF TITLE 26, UNITED STATES CODE.

4. Telephone number 415-471-7260 is subcribed to by James Fernandez, and located at 1345 G Street, Union City, California.

5. The logs of telephone number 415-656-7173 disclose that:

(a) On February 19, 1971 at 8:07 p.m. a female called 471-7260 and asked for "Jim". A male identified as "Pelone" then replaced the female on telephone 415-656-7173 and spoke to the male who identified himself as "Jim". "Pelone" instructed "Jim" to break down $50,000.00 by five's, ten's, and twenty's and put it where they put it before they go down.

(b) On February 19, 1971 at 8:10 p.m. a male called 471-7260 and instructed the male answering to call "Louie" and tell him to only take money.

(c) On February 21, 1971 at 3:30 p.m. a male called 471-7260 and told the male answering that he wanted "five fifties" and to deliver them to the usual place.

6. Based upon my experience as a Special Agent of the Bureau of Narcotics and Dangerous Drugs and my familiarity with the investigation of Umberto Jose Chavez and his organization, a usual quantity of packaging of heroin is in prophylactics with the value of $50.00 and that "pieces" refers to ounces of heroin.

7. The logs of telephone number 415-656-7173 further disclose that:

(a) On February 21, 1971 at 9:17 p.m. a male called 471-7260 and the male answering told the male calling that he had "picked it up from Louie" and "gave Mondo the 93; plus the 5 you took makes 98".

(b) On February 21, 1971 at 9:20 p.m. a male called 489-0620 and asked a male identified as "Mondo" if he received the things, and told him it would have to hold him for a few days but there would be more coming.

(c) On February 21, 1971 at 10:36 p.m. a female called 886-9288 and after the female answering complained that she had only received 14 "pieces" instead of 15 "pieces" from "Jim", the female caller related that she would only have to pay what "Jim" wrote in his book.

(d) On February 22, 1971 at 8:41 a.m. a female called 471-7260 and told the female answering that if anyone calls to see "Louie", tell them to go see "Mondo".

(e) On February 22, 1971 at 2:09 p.m. a male called 471-7260 and asked the male identified as "Jim" if he was ready to go. "Jim" replied that he was getting ready to call and would call back.

(f) On February 22, 1971 at 2:16 p.m. a male identified as "Jim" called 415-656-7173 and told the male answering that he (Jim) is supposed to leave at four and has to be there thirty minutes early. A meeting was then set between the two where money was to be exchanged. The location of the place was identified as the dump and the time of the meeting was 3:00 p.m.

8. On February 22, 1971 at approximately 3:00 p.m. I observed a male known to me as Jim Fernandez arrive at the Union City dump. Special Agent Art Johnson,

Bureau of Narcotics and Dangerous Drugs, an agent on surveillance at the Union City dump advised me that on the above date at shortly after 3:00 p.m. he observed a male known to him as Umberto Jose Chavez arrive at that location and meet with Jim Fernandez. Following this meeting I followed Jim Fernandez to the Oakland International Airport where he boarded a plane destined for San Diego, California.

NORMAL INVESTIGATIVE PROCEDURES REASONABLY APPEAR UNLIKELY TO SUCCEED.

9. The logs of telephone 415-656-7173 further disclose that:

(a) On February 22, 1971, at 6:42 p.m. a female called 415-656-7173 and told a male identified as "Pelone" that when a third person left, that third person took the key to the place where the "chiva" was kept and she could not get any out. Further discussions revealed the female caller had present access to a small amount of "chiva." "Pelone," after instructing the female caller concerning that available, told her to call him again.

(b) On February 22, 1971, at 7:36 p.m., a female called 415-656-7173 and told a male identified as "Pelone" that she was able to open the suitcase. A sale price was then discussed.

10. I have been advised by Anthony A. Selaya, Special Agent, Bureau of Narcotics and Dangerous Drugs, who is fluent in Spanish, that "chiva" is the vernacular for heroin. Agent Celaya has also advised me that he has listened to conversations placed from telephone 415-656-7173 to 415-471-7260 and that from his familiarity with the voice of the female who often answers 415-471-7260, the female referred to in 9 (a) and (b) above is the same female who often answers telephone 415-471-7260.

11. Based upon my knowledge as a Special Agent of the Bureau of Narcotics and Dangerous Drugs of narcotics cases, and my association with other Special Agents

who have conducted investigations of illegal narcotics traffic, normal investigative procedures appear unlikely to succeed in establishing:

(a) That "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown are involved in illegal narcotic activities in violation of Federal laws;

(b) The full extent of this conspiracy to import and distribute the illegal narcotics imported from Mexico and transported to Northern California; and

(c) The identity of the co-conspirators, aiders and abetters of the organization illegally importing and distributing heroin.

12. The house located at 1345 G Street, Union City, California is located in a predominantly Mexican-American area in which other members of this organization reside. Consequently surveillance is practically impossible since Government vehicles and agents can be readily identified.

13. My experience and the experiences of other Special Agents of the Bureau of Narcotics and Dangerous Drugs has shown that individuals dealing in large quantities of narcotics are particularly covert in their activities and wary of surveillance by law enforcement personnel.

14. At this time there is no known undercover access to Jim Fernandez.

15. For the reasons set out here and above, all normal avenues of investigation are closed and it is my belief that the only reasonable way to twenty (20) days from the date of the Order, whichever is earlier.

JULIUS BERETTA
Special Agent, Bureau of Narcotics and Dangerous Drugs
San Francisco, California Office

Subscribed and sworn to before me this day of , 1971.

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 6

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury.

Application under oath having been made before me by Maurice K. Merten, an attorney of the Organized Crime and Racketeering Section of the United States Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510 (7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

a. There is probable cause to believe that "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, have committed and are committing offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a) of Title 26, United States Code.

b. There is probable cause to believe that wire communications of "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, concerning these offenses will be obtained through their interception, authorization for which is herein applied. In particular, these wire communications will concern:

(1) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the availability of heroin illegally imported from Mexico to the United States and transported to Northern California.

(2) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown relative to the overall operation of an organization illegally importing and distributing heroin.

(3) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the method and scope of distribution of heroin throughout Northern California.

(4) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the place of storage of heroin illegally imported into the United States from Mexico.

(5) The communications between "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown concerning the number and identity of the sellers of the heroin illegally imported into the United States by these individuals and others.

c. Normal investigative procedures reasonably appear unlikely to succeed.

d. There is probable cause to believe that telephone number 415-471-7260 subscribed to in the name of James Fernandez and located at 1345 G Street, Union City, California, has been used and is being used by "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, in connection with the offenses described in (a) above.

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury, are authorized, pursuant to the application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in

this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to:

(1) Intercept wire communications of "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, concerning the above described offenses to and from telephone 415-471-7260, subscribed to in the name of James Fernandez and located at 1345 G Street, Union City, California.

(2) Not automatically terminate the interception when the described type of communications sought are first obtained, but that this authority to intercept continue for a reasonable time thereafter, not to exceed a total of twenty (20) days from he date of the Order, which will reveal the manner in which "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, illegally import, receive, transport, conceal, distribute, and sell narcotic drugs not in or from the original stamped package, and conspire to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a) of Title 26, United States Code, and which will reveal the identity of their confederates, their places of operation, and the nature of the conspiracy involved therein.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after the signing of this Order, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and shall terminate upon obtainment of the authorized objective, or in any event, at the end of twenty (20) days from the date of this Order.

It is further ordered, upon request of the applicant, that the Pacific Telephone and Telegraph Company, a communications common carrier as defined in Section 2510 (10) of Title 18, United States Code, shall forthwith furnish the Applicant and the Bureau of Narcotics and Dangerous Drugs all information, facilities, and technical assistance necessary to accomplish the interception

unobtrusively and with a minimum of interference with the services that such carrier is according the persons whose communications are to be intercepted.

* * * *

the furnishing of such facilities or technical assistance by the Pacific Telephone and Telegraph Company to be compensated for by the Applicant or the Bureau of Narcotics and Dangerous Drugs, Department of Justice, at the prevailing rates.

PROVIDING ALSO, that Maurice K. Merten shall provide the Court with a report on the 5th, 10th, and 15th days following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception:

/s/ Oliver J. Carter
United States District Judge

This 25 day of February 1971 at 3:25 O'Clock P.M.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 6

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF PEN REGISTERS OR TOUCH TONE DECODERS

ORDER AUTHORIZING THE USE OF PEN REGISTERS OR TOUCH TONE DECODERS

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury.

Affidavit under oath having been made before me by Julius Beretta, Special Agent of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, and full consideration having been given to the matters set forth therein, the Court finds:

a. There is probable cause to believe that "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown have committed and are committing offenses involving the illegal importation, receipt, transportation, concealment, distribution, and sale of narcotic drugs not in or from the original stamped package and a conspiracy to commit such offenses, in violation of Section 174, Title 21, United States Code, and Sections 4704 (a) and 7237 (a) of Title 26, United States Code.

b. There is probable cause to believe telephone number 415-471-7260, subscribed to in the name of James Fernandez, and located at 1345 G Street, Union City, California, has been used and is being used by "Pelone", "Jim", "Jesse", "Mondo", "Olivia", and others as yet unknown, in connection with the offenses described in (a) above.

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, and Special Agents of the United States

Customs Agency Service, Bureau of Customs, Department of Treasury, are authorized to:

a. Install mechanical devices on telephone number 415-471-7260, subscribed to in the name of James Fernandez, and located at 1345 G Street, Union City, California, which will reveal the telephone numbers of all outgoing calls dialed from the above described telephone.

b. Continue use of such mechanical devices in operation until the telephone numbers of all outgoing calls dialed lead to the identities of the confederates of the conspiracy involving the importation and distribution of illegal narcotics, and their places of operation, for a period of twenty (20) days from the date of this Order, whichever is earlier.

PROVIDING THAT, this authorization to install and operate the above described mechanical devices must terminate upon attainment of the authorized objective or, in any event, at the end of twenty (20) days from the date of this Order.

/s/ Oliver J. Carter
United States District Judge

DATE February 25, 1971

JAMES E. RITCHIE
Organized Crime and Racketeering Section
U.S. Department of Justice
450 Golden Gate Avenue, Box 36132
San Francisco, California 94102
(415) 556-0750

Attorney for the Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 71-406 SAW

UNITED STATES OF AMERICA, PLAINTIFF

v.

UMBERTO JOSE CHAVEZ,
also known as Pelon;
IRENE CHAVEZ;
JAMES FERNANDEZ;
ANN FERNANDEZ;
OLIVIA MIRAMONTES,
also known as Olivia Montes;
JESSE BUSTAMANTE;
ARMANDO RAMIREZ,
also known as Mando;
CARMEN RAMIREZ;
DELORES FERNANDEZ;
GEORGE APODACA;
MARGARET APODACA;
VERNON BACA;
FILEMON MIRAMONTES;
and
PEDRO ARAUJO,
DEFENDANTS

VIOLATIONS:

21 U.S.C. 173, 174—Conspiracy to Import and Distribute Heroin.

18 U.S.C. 1952—Interstate Travel with the Intent to Promote a Business Enterprise Involving Narcotics

INDICTMENT

COUNT ONE:

(Title 21, United States Code, Sections 173 and 174)

The Grand Jury Charges: THAT

From on or about the 18th day of February, 1971, the exact date being to the Grand Jury unknown, and continuing thereafter to the 27th day of February, 1971, within the Northern District of California,

UMBERTO JOSE CHAVEZ,
also known as Pelon;
IRENE CHAVEZ;
JAMES FERNANDEZ;
ANN FERNANDEZ;
OLIVIA MIRAMONTES,
also known as Olivia Montes;
JESSE BUSTAMANTE;
ARMANDO RAMIREZ,
also known as Mando;
CARMEN RAMIREZ;
DELORES FERNANDEZ;
GEORGE APODACA;
MARGARET APODACA;
VERNON BACA;
FILEMON MIRAMONTES;
and
PEDRO ARAUJO,

the defendants herein, and an individual known only to the Grand Jury as John Doe, also known as "Louie", named herein as a co-conspirator but not as a defendant, did wilfully, knowingly and unlawfully conspire together and with divers other persons whose names are to the Grand Jury unknown, to violate Sections 173 and 174, Title 21, United States Code, by conspiring to import and bring into the United States quantities of the narcotic drug heroin contrary to law, and to receive, conceal, sell and facilitate the transportation, concealment and

sale of quantities of the narcotic drug heroin which had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law.

The Grand Jury further charges that in furtherance of the said conspiracy and to effectuate the objects thereof, the defendants committed, in the Northern District of California, the following:

Overt Acts

1. On February 19, 1971, Vernon Baca placed a telephone call to the residence of Umberto Jose Chavez, Fremont, California.

2. On February 22, 1971, James Fernandez departed by airplane from the Oakland International Airport, Alameda County, California.

3. On February 26, 1971, Ann Fernandez met Olivia Miramontes in the vicinity of Levine Hospital, Hayward, California.

4. On February 27, 1971, George Apodaca delivered an automobile tire to the residence located at 1167 C Street, Hayward, California.

COUNT TWO:

(Title 18, United States Code, Section 1952)

The Grand Jury Further Charges: THAT

On or about the 24th day of February, 1971, in the Northern District of California,

UMBERTO JOSE CHAVEZ,
also known as Pelon,

a defendant herein, did use and cause others to use a facility in foreign commerce, to wit, a telephone, between the Northern District of California and the Republic of Mexico, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management and carrying on of an unlawful activity, that is, a business enterprise involving narcotics in violation of Sections 11500, 11500.5, and 11501 of the California Health and

Safety Code, and thereafter, UMBERTO JOSE CHAVEZ, did perform and cause to be performed acts to promote, manage, establish and carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Section 1952.

COUNT THREE:

(Title 18, United States Code, Section 1952)

The Grand Jury Further Charges: THAT

On or about the 22nd day of February, 1971, in the Northern District of California,

JAMES FERNANDEZ,

a defendant herein, did travel in foreign commerce between the Northern District of California and the Republic of Mexico, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management and carrying on of an unlawful activity, that is, a business enterprise involving narcotics, in violation of Sections 11500, 11500.5, and 11501 of the California Health and Safety Code, and thereafter, JAMES FERNANDEZ, did perform and cause to be performed acts to promote, manage, establish and carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Section 1952.

A TRUE BILL

/s/ Donald L. [Illegible]
Foreman

/s/ James L. Browning, Jr.
JAMES L. BROWNING, JR.
United States Attorney

/s/ James E. Ritchie
JAMES E. RITCHIE
Attorney in Charge
Organized Crime and Racketeering Section
U.S. Department of Justice
San Francisco, California

JAMES F. HEWITT
Federal Public Defender
EARLE A. PARTINGTON
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Counsel for Defendant George Apodaca

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 71-406 SAW

[Filed Apr. 13, 1972, C. C. Evensen, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

v.

UMBERTO CHAVEZ, ET AL., DEFENDANTS

NOTICE OF MOTION AND MOTION TO SUPPRESS WIRETAP EVIDENCE

TO: THE UNITED STATES ATTORNEY AND MAURICE K. MERTEN, SPECIAL ATTORNEY, DEPARTMENT OF JUSTICE:

PLEASE TAKE NOTICE that the defendants by and through their counsel on the 11th day of May 1972 at 2:15 p.m. before the Honorable Stanley A. Weigel will move this court, and do so move this court, for an order, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, 18 U.S.C. § 2518(10)a, and all other applicable law, suppressing the wiretap evidence and the fruits thereof.

This motion is based upon the files and records of this case, the files and records of *United States* v. *Eckstein, et al.*, N.D. Cal. CR-71-1531 SC, including the wiretap applications in that case, the attached memorandum of points and authorities, and any further authorities and matters which may be raised at argument or other appropriate times.

Dated: April 7, 1972

JAMES F. HEWITT
Federal Public Defender

/s/ Earle A. Partington
EARLE A. PARTINGTON
Assistant Federal Public Defender

Submitted on behalf of and with authority from all counsel whose signatures appear upon the attached points and authorities.

JAMES F. HEWITT
Federal Public Defender
EARLE A. PARTINGTON
Assistant Federal Public Defender
450 Golden Gate Avenue, P.O. Box 36106
San Francisco, California 94102
Telephone: 556-7712

Counsel for Defendant George Apodaca

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 71-406 SAW

UNITED STATES OF AMERICA, PLAINTIFF

v.

UMBERTO CHAVEZ, ET AL., DEFENDANTS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO SUPPRESS THE WIRETAP EVIDENCE

I. THE INTERCEPTIONS OF WIRE COMMUNICATIONS WERE NOT MADE IN ACCORDANCE WITH THE PROVISIONS OF 18 U.S.C. § 2516 AND 2518.

A. *The First Order* (Chavez tap)

The material relating to the tap of the Chavez phone consists of seven documents:

1. A memorandum from Attorney General John Mitchell, dated February 18, 1971, "specially designating" Assistant Attorney General Will Wilson to exercise the power to authorize Maurice Merten to apply to this Court for an order authorizing the interception of wire communications. (Appendix A1)

2. A letter of authorization, dated February 18, 1971, purportedly signed by Will Wilson, Assistant Attorney General, to the effect that Wilson had reviewed the "re-

quest and the facts and circumstances detailed therein" and concluded that "probable cause" exists to believe that named persons were violating the narcotics laws, and a further finding of probable cause to believe that they will use the described communication facility in connection with those offenses. The letter continues as follows:

> Accordingly, you are hereby authorized under the power specially designated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application, etc. . . .

(Appendix A2)

3. An application filed in this court in which it was stated that pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications." (Appendix A3)

4. The affidavit in support of the application. (Appendix A4)

5. The two orders of this Court granting the application as "authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code." (Appendix A5)

6. The affidavit of Henry Petersen, then a Deputy Assistant Attorney General in the Criminal Division, relating to the processing of the application. His affidavit sets forth the following procedure:

a. A request for a wire interception order was made by the Narcotics Bureau;

b. The Department file is then reviewed by an attorney in the Criminal Division, in this case Philip T. White, who recommended "favorable action" on the request;

c. White's superior, William Lynch, approved the recommendation;

d. The file then went to Henry Petersen who examined it and forwarded it to the Office of the Attorney General, also recommending that the authorization be granted;

e. After approval by the "Office of the Attorney General," Henry Petersen signed Will Wilson's name to a letter (Appendix A2) authorizing the application to the court for the wiretap. Will Wilson, the "specially designated" official, never saw the file. This procedure was "standard." (Appendix A6)

7. The affidavit of Sol Lindenbaum, Executive Assistant to the Attorney General, in which Mr. Lindenbaum states:

> With respect to the [Chavez tap], the Attorney General on February 18, 1971, approved the request that the authorization be given to Maurice Merten to make application for an interception order . . . Attached is a copy of the Attorney General's personally initialled memorandum of that date to Will Wilson reflecting his favorable action on the request.

(Appendix A7)

From these seven documents it is apparent that, with deference to Mr. Lindenbaum, the Attorney General's memorandum does no more than "specially designate" Will Wilson to exercise the power conferred on the Attorney General by statute to authorize Merten's application. By implication this authority could have been used to refuse authorization for the tap. And, pursuant to this "special designation" Will Wilson found "probable cause" and exercised the delegated power by his letter of February 18, 1971.

The Attorney General did *not* assert that he found probable cause, or that *he* reviewed the request, or that he had any knowledge of the case other than that approval had been recommended. His delegation of Will

Wilson was ministerial, and while he initialled the memorandum, it is significant that Sol Lindenbaum also placed the Attorney General's initials on a similar memorandum (See Appendix A7.).

These facts would bring this case within the holding of *United States* v. *Robinson, infra.* The government will no doubt attempt to bring this case within *United States* v. *La Gorga*, 336 F.Supp. 190 (W.D.Pa. 1971), wherein it was held that it made no difference if Will Wilson's name was signed by Henry Petersen where the Attorney General personally authorized the submission of an application. *La Gorga* can be distinguished from the present case in which the Attorney General did no more than designate Will Wilson to review the application. Regardless of this distinction, *La Gorga* would seem inconsistent with Robinson.

B. *The Second Order* (Fernandez tap)

The material relating to the tap of the Fernandez phone consists of seven documents:

1. A memorandum from Attorney General John Mitchell, dated February 25, 1971, "specially designating" Assistant Attorney General Will Wilson to exercise the power to authorize Maurice Merten to apply to this Court for an order authorizing the interception of wire communications. (Appendix B1)

2. A letter of authorization, dated February 25, 1971, purportedly signed by Will Wilson, Assistant Attorney General, to the effect that Wilson had reviewed the "request and the facts and circumstances detailed therein" and concluded that "probable cause" exists to believe that named persons were violating the narcotics laws, and a further finding of probable cause to believe that they will use the described communication facility in connection with those offenses. The letter continues as follows:

> Accordingly, you are hereby authorized under the power specially designated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power

conferred on him by Section 2516 of Title 18, United States Code, to make application, etc. . . .
(Appendix B2)

3. An application filed in this Court in which it was stated that "pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire communications." (Appendix B3)

4. The affidavits in support of the application. (Appendix B4)

5. The two orders of this Court granting the application as "authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code." (Appendix B5)

6. The affidavit of Sol Lindenbaum, Executive Assistant to the Attorney General, in which Mr. Lindenbaum states:

> In the second instance [Fernandez tap], I reviewed the submitted material, concluded that the request satisfied the requirements of the statute and also concluded, from my knowledge of the Attorney General's actions on previous cases, that he would approve the request if submitted to him. Because the Attorney General was not available on this occasion, I approved the request pursuant to the authorization which he had given to me to act in the circumstances and caused his initials to be placed on a memorandum to Will Wilson. The memorandum approved a

request that authorization be given to Maurice Merten to make application for an interception order. (Appendix A7)

7. The affidavit of Harold P. Shapiro, Deputy Assistant Attorney General, Criminal Division, wherein Mr. Shapiro states he signed Will Wilson's name to the letter of authorization (Appendix B2) for the application for the wiretap. (Appendix B6)

From these seven documents it can be seen that the procedure followed for approval of the Fernandez tap was similar to that used in the Chavez tap, with two major modifications:

Sol Lindenbaum placed John N. Mitchell's initials on the memorandum dated February 25, 1971, after concluding that the request satisfied the statute. Lindenbaum stated that the memorandum "approved a request that authorization be given to Maurice Merten to make application for an intenception order." Again, with deference, the memorandum *just does not say that.* It simply purports to "specially designate" Will Wilson to exercise the power to authorize the wiretap. By implication Will Wilson could have refused authorization for the tap.

Wilson's letter, stating that he has reviewed the "facts and circumstances" and finding probable cause, consistent with the designating memorandum of February 25, 1971, purported to exercise the power so delegated to him by the Attorney General. In addition, Harold Shapiro, another Deputy Assistant Attorney General, signed Will Wilson's name to the letter of February 25, 1971.

Thus it is apparent that neither the Attorney General nor his specially designated Assistant performed the important function required by the statute, that of weighing the evidence and determining whether such a gross invasion of privacy was justified in the public interest. This procedure is not in accordance with the specific mandate of Congress.

The Court of Appeals for the Fifth Circuit has recently reserved a conviction where the statutory pro-

cedures set forth in 18 U.S.C. § 2516 and 2518 were not followed (*United States* v. *Robinson*, decided January 12, 1972), copy of which is attached as Appendix C. The Fifth Circuit held that Congress intended to vest a "publicly responsible official subject to the political process" with the responsibility for giving his "*personal* attention" to such matters. This view was followed in *United States* v. *Cihal*, 336 F.Supp. 261 (W.D.Pa. 1972), and *United States* v. *Aquino*, —— F.Supp. —— (E.D. Mich., Jan. 17, 1972).

In the instant case, the allegation in the applications that Will Wilson, the designated official, had reviewed the requests and found probable cause was simply not true. It is not clear what the District Court would have done had it known the true circumstances, but it acted upon an assurance that a high official as required by statute had made the threshold determination to request authority to intercept these private conversations.

The enactment of Title III of the Omibus Crime Control and Safe Streets Act of 1968, the wiretap provisions, was not free from difficulty. Strong views were expressed on both sides of the question. 1968 U.S. Code, Congressional and Administrative News, Vol. 2, pp. 2209-2309. It was obvious that Congress was concerned about "rubber stamp" approval of wiretap authorizations. The dual requirement of executive and judicial determination prior to such invasions may have been a determining factor in the passage of the legislation. As the Court of Appeals said in *Robinson*, *supra*:

> Congress could justifiably feel it important that the public know that only an identifiable person subject to the political process could trigger the unknown, unseen, unheard intrusion into private affairs that constitutionally protected against unreasonable searches, entitled to freedom from self-incriminatory results, and presumptively innocent.

Since the statutory requirements were not met in this case, the wiretap order is invalid and the intercepted wire communications should be suppressed.

II. THE ORDER AUTHORIZING THE WIRETAP WAS BEYOND THE AUTHORIZATION OF THE ATTORNEY GENERAL FOR THE APPLICATION.

From a reading of Section 2516 of Title 18, it is clear that a dual screening process is required. First, a responsible Justice Department official must determine that the procedure is warranted by the particular case. He must, in order to make this essential determination be satisfied that the proposed wiretap is related to a specific offense, that normal procedures are inadequate, and that statutory limitations are imposed upon the request. These requirements "go a long way toward guaranteeing that no abuse will happen." Senate Report No. 1097, U.S. Code and Congressional News, Vol. 2, p. 2185.

Secondly, a judicial officer above the magistrate level (District Court or Court of Appeals, see 18 U.S.C. § 2510(9)(a)) must exercise that detached judgment essential to meet the demands of the Fourth Amendment, so that "no greater invasion of privacy [would be] permitted than was necessary under the circumstances." *Berger* v. *New York*, 388 U.S. 41 at 57, 87 S.Ct. 1873, at 1882. This aspect of the statute provides for the judicial order to accommodate "the legitimate needs of law enforcement" by permitting the authorization of the *carefully limited* use of electronic surveillance. *Katz* v. *United States*, 389 U.S. 347 at 356, 88 S.Ct. 507, at 514 (1967).

Once the Executive Department, acting through the statutorily authorized official, has approved a "carefully limited" request to the Court for a wiretap order, it would defeat the purpose of the statute to allow the order to exceed the scope of the request. This "double check" procedure was designed to insure that "precise and discriminate circumstances" were present to meet the requirements of the Fourth Amendment. *Osborn* v. *United States*, 385 U.S. 323, 87 S.Ct. 429; *Katz* v. *United States*, *supra*.

Section 2518(1) of Title 18 provides that application under oath be made to a judge, and that such application

"shall state the applicant's authority to make such application," and shall include a:

> (b) . . . (iii) particular description of the type of communications sought to be intercepted. . . .

In the instant case, the authority to make application was granted by Will Wilson, specially delegated by the Attorney General. See letters dated February 18, 1971, and February 25, 1971. (Appendices A2 and B2) The letters purport to authorize Maurice Merten to make application to a judge for an order authorizing drug agents "to intercept wire communications *from* a facility described . . . for twenty days." (Emphasis supplied) Significantly, the letter recites that a broader authorization was sought, to "intercept wire communications *to and from*" certain telephone numbers. Thus, the Attorney General limited the authorization to calls *from the numbers*. These letters of authorization were attached to the formal applications. (Appendices A3 and B3)

Notwithstanding the "carefully limited" scope of the aouthorization, application was made to the court for an order authorizing the interception of wire communications "to and from" certain numbers.

That this question of "to and from" is significant to the government as well as to the defense, it is only necessary to look at *United States* v. *Eckstein, et al.*, N.D.Cal. CR-71-1531 SC dismissed February 18, 1972, in which five letters of authorization were used. The first four speak in terms of "from," the fifth in terms of "to and from." Copies of these letters are attached as Appendix D.

Acting on the application "authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General . . .," the court authorized wiretaps "to and from" the facility clearly in excess of the executive authorization.

For these additional reasons, all wire communications *to* to the specified telephone should be suppressed.

III. CONCLUSIONS

The entire area of electronic eavesdropping is a sensitive one. It augers the police state our forefathers sought to prohibit; and a future we must protect. The legislative history of Title III of the Safe Streets Act supports the conclusion that Congress was aware of the potential for abuse in blanket power to wiretap. When such a power is exercised, it must be with circumspection consistent with this legislative purpose. Here the Congress' fears were realized. The "specially designated" Assistant Attorney General, Will Wilson, "did not examine either file or expressly authorize either application." (See affidavits of Harold Shapiro, Appendix B6, and Henry Petersen, Appendix A6.) The applications were handled routinely in accordance with "standard procedures." The Court was told that Will Wilson, the special designee, had reviewed the files. He had not. Additionally the orders applied for and granted were in excess of the scope of the invasion approved. The Fourth Amendment requires that statutes such as this be interpreted strictly. Only by literal compliance can this most serious of intrusions into man's privacy be controlled. Any relaxation

of these self-imposed restraints can only weaken the Constitutional protections in this important area.

Accordingly, the conversations intercepted pursuant to the instant orders and all information obtained therefrom should be suppressed.

DATED: April 6, 1972

Respectfully submitted,

/s/ William L. Osterhoudt
WILLIAM L. OSTERHOUDT
Attorney for Defendant
Vernon Baca

/s/ Andre T. Laborde
ANDRE T. LABORDE
Attorney for Defendant
Armando Ramirez

/s/ Peter G. Keane
PETER G. KEANE
Attorney for Defendant
Carmen Ramirez

/s/ Paul Alvarado
PAUL ALVARADO
Attorney for Defendant
James Fernandez

/s/ James Giller
JAMES GILLER
Attorney for Defendants
Umberto and Irene Chavez

/s/ Gerald H. Wilhelm
GERALD H. WILHELM
Counsel for Defendant
Margaret Apodaca

/s/ Murray B. Petersen
MURRAY B. PETERSEN
Attorney for Defendant
Dolores Fernandez

/s/ Claude O. Allen
Attorney for Defendant
Jesse Bustamente

/s/ Earle A. Partington
EARLE A. PARTINGTON
Attorney for Defendant
George Apodaca

/s/ Clinton W. White
CLINTON W. WHITE
Attorney for Defendant
Olivia Miramontes

/s/ J. Bradley Klemm
J. BRADLEY KLEMM
Attorney for Defendant
Ann Fernandez

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Cr. No. 71-406 SAW

UNITED STATES OF AMERICA

v.

GEORGE APODACA

AFFIDAVIT

District of Columbia:

Sol Lindenbaum being duly sworn deposes and says:

At the times of the acts related in this affidavit I was and I am now the Executive Assistant to the Attorney General of the United States. I assist the Attorney General in the review of various matters which require his personal attention such as opinions, interpretations, decisions of the Board of Immigration Appeals, applications for pardon and other forms of Executive clemency, antitrust complaints, contracts, agreements, and proposed offers in compromise. See Title 28, Code of Federal Regulations, Section 0.6.

The Attorney General has refrained from designating any Assistant Attorney General to authorize, without his approval, the making of an application for an order permitting the interception of wire or oral communications under Title 18, United States Code, Section 2516 (1). Rather, the Attorney General has required that all requests for such authorization be referred to him for consideration. In the normal course of my duties, I review such requests and make recommendations to the Attorney General thereon. I have routinely reviewed such requests since February 1969 and, accordingly, have become familiar with the applicable statutory requirements and the actions taken by the Attorney General on such requests.

On February 16, 1971, and February 25, 1971, the Criminal Division of the Department of Justice addressed to the Attorney General requests for approval of authori-

zation to apply for interception orders with respect to certain telephones in California. The first request related to a telephone in Fremont, California, allegedly used by Umberto Jose Chavez and others. The second related to a telephone in Union City, California, allegedly used by a person identified only as "Pelone" and others. In each instance, the request was accompanied by copies of the proposed affidavit, application, and order, as well as a recommendation for approval from the Criminal Division.

With respect to the first, the Attorney General on February 18, 1971, approved the request that the authorization be given to Maurice Merten to make application for an interception order with respect to the mentioned telephone in Fremond, California. Attached is a copy of the Attorney General's personally initialed memorandum of that date to Will Wilson reflecting his favorable action on the request.

In the second instance, I reviewed the submitted material, concluded that the request satisfied the requirements of the statute and also concluded, from my knowledge of the Attorney General's actions on previous cases, that he would approve the request if submitted to him. Because the Attorney General was not available on this occasion, I approved the request pursuant to the authorization which he had given to me to act in the circumstances and caused his initials to be placed on a memorandum to Will Wilson. The memorandum approved a request that authorization be given to Maurice Merten to make application for an interception order. A copy of this memorandum is attached.

/s/ Sol Lindenbaum
SOL LINDENBAUM
Executive Assistant to the
Attorney General of the
United States

Subscribed and sworn to before me this 9th day of February, 1972.

/s/ Audrey Anne Crump

My Commission Expires August 31, 1976

Form DJ-150
(Ed 4-26-65)

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

MEMORANDUM

TO : Will Wilson
Assistant Attorney General
Criminal Division

DATE: Feb. 18, 1971

JNM:PTW:lrt

FROM : John N. Mitchell
Attorney General
/s/ J.N.M.

SUBJECT: *Interception Order Authorization*

This is with regard to your recommendation that authorization be given to Maurice K. Merten of the Criminal Division to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a twenty (20) day period to and from telephone number 415-656-7173, located at 220 Carmelita Place, Fremont, California, in connection with the investigation into possible violations of Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4704 and 7237, by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise that power for the purpose of authorizing Maurice K. Merten to make the above-described application.

Form DJ-150
(Ed 4-26-65)

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

MEMORANDUM

TO : Will Wilson DATE: Feb. 25, 1971
Assistant Attorney General
Criminal Division JNM:CLL:skh

FROM : John N. Mitchell
Attorney General
/s/ J.N.M.

SUBJECT: *Interception Order Authorization*

This is with regard to your recommendation that authorization be given to Maurice Merten of the Criminal Division to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a twenty (20) day period to and from telephone number 415-471-7260, located at 1345 G Street, Union City, California, in connection with the investigation into possible violations of Title 21, United States Code, Section 174 and Title 26, United States Code, Sections 4704(a) and 7237(a) by persons identified only as "Pelone," "Jim," "Jesse", "Mondo," "Olivia" and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Maurice Merten to make the above-described application.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Cr. No. 71-406 SAW

UNITED STATES OF AMERICA

v.

GEORGE APODACA

AFFIDAVIT

District of Columbia:

Harold P. Shapiro, being duly sworn, deposes and says:

At the times of the events related in this affidavit, I was a Deputy Assistant Attorney General in the Criminal Division of the United States Department of Justice.

This affidavit describes the processing within the Criminal Division of the Department of Justice of a request for authorization to make application to a Federal Court for a wire interception order with respect to a certain telephone in Union City, California, allegedly used by a person identified only as "Pelone" and others.

The formal request for authorization to apply for the wire interception order was made by the Director of the Bureau of Narcotics and Dangerous Drugs on February 25, 1971. Prior to action on the request, the Department file, which included copies of the proposed affidavit, application, and order, was reviewed in a special Unit of the Organized Crime and Racketeering Section of the Criminal Division by an attorney whose primary function was to review the entire matter for form and substance with particular emphasis on assuring strict adherence to the required statutory, judicial and Constitutional standards. The attorney of that Unit handling the requests, Carl LoPresti, and his supervisor, Philip T. White, reviewed the file and recommended favorable action on the request. The file was then submitted for review to Edward T. Joyce, a Deputy Chief of the Organized Crime and Racketeering Section, who recommended

approval of its request and sent it to me. I examined the file and forwarded it to the Office of the Attorney General with a detailed recommendation that the authorization be granted. Following approval in the Office of the Attorney General, the Criminal Division dispatched the letter dated February 25, 1971, to Maurice Merten advising him that he was authorized to present the application to the court.

I signed Will Wilson's name to the letter of February 25, 1971, in accordance with the authorization of Will Wilson and the standard procedures of the Criminal Division. I regarded the signing of Will Wilson's name as a ministerial act, because Will Wilson had authorized me to sign his name to and dispatch such a letter of authorization in every instance in which the request had been favorably acted upon in the Office of the Attorney General. Will Wilson did not examine the files or expressly authorize the applications. Attached is a copy of Will Wilson's affidavit of September 15, 1971, respecting an authorization letter dated June 16, 1969, in which he stated that he had authorized me to sign letters of this nature.

/s/ Harold P. Shapiro
HAROLD P. SHAPIRO
Deputy Assistant Attorney General
Criminal Division

Subscribed and sworn to before me this 9th day of February, 1972.

/s/ Audrey Anne Crump

My Commission Expires August 31, 1976

AFFIDAVIT

District of Columbia:

Will Wilson, Assistant Attorney General of the United States, being duly sworn, states:

I am Assistant Attorney General in charge of the Criminal Division of the United States Department of Justice and have been since January 1969.

I have authorized Deputy Assistant Attorney General Henry E. Petersen and Deputy Assistant Attorney General Harold Shapiro to sign my name to letters of authorization for application to United States District Courts for orders under Title 18, United States Code, Section 2518, after such application had been approved by the Attorney General.

The letter authorizing William G. Earle to make an application to the court for an interception order with respect to certain telephones commonly used by Martin and Jesse Sklaroff at Miami International Airport was signed for me by Mr. Petersen pursuant to my authorization. A copy of the carbon copy of this letter presently in the files of the Department of Justice is attached as Exhibit 1.

/s/ Will Wilson
WILL WILSON
Assistant Attorney General
Criminal Division

Subscribed and sworn to before me this 15th day of Sept., 1971.

/s/ Audrey Anne Crump
My Comm. Expires 8/31/76

Typed: June 9, 1969
WW:PTW:lrt

June 16, 1969.

Mr. William G. Earle,
Post Office Box 4139,
160 Northeast Fourth Street,
Miami, Fla.

Dear Mr. Earle: This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an order of the court authorizing the Federal Bureau of Investigation to intercept wire communications to and from four pay telephones at the Miami International Airport near the entrance to Concourse 2 between United and Northwest Airlines counters, carrying phone numbers 691-9981, 691-9566, 691-9797, and 691-9528.

I have reviewed your request and the facts and circumstances detailed in the affidavit of Special Agent Edwin J. Sharp and have determined that probable cause exists to believe that Martin Sklaroff, Jess Sklaroff, and others are engaged in the commission of an offense enumerated in Section 2516 of Title 18, United States Code, to wit: violations of Section 1084 of Title 18, United States Code, and a conspiracy to violate this statute. I have further determined that there exists probable cause to believe that the above person will make use of the described facilities in connection with that offense, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures are unlikely to succeed or are too dangerous to be used.

Accordingly, you are hereby authorized under the power specially delegated to me in relation to the above described offenses by the Attorney General pursuant to the power conferred on the Attorney General by Section 2516, Title 18, United States Code, to make application to a judge of competent jurisdiction for an order pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications from the facilities described above.

Sincerely,

WILL WILSON
Assistant Attorney General.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Cr. No. 71-406 SAW

UNITED STATES OF AMERICA

v.

GEORGE APODACA

AFFIDAVIT

Henry E. Petersen, being duly sworn, deposes and says:

I am Assistant Attorney General in charge of the Criminal Division. At the times of the events related in this affidavit, I was a Deputy Assistant Attorney General in the Criminal Division, United States Department of Justice.

This affidavit describes the processing within the Criminal Division of the Department of Justice of the request for authorization to make application to a Federal Court for a wire interception order pertaining to a certain telephone in Fremont, California, allegedly used by Umberto Jose Chavez and others.

The formal request for authorization to apply for a wire interception order in this matter was made by the Director of the Bureau of Narcotics and Dangerous Drugs on February 12, 1971. Prior to action on the request, the Department file, which included copies of the proposed affidavit, application, and order, was reviewed in a special Unit of the Organized Crime and Racketeering Section of the Criminal Division by an attorney whose primary function was to review the entire matter for form and substance with particular emphasis on assuring strict adherence to the required statutory, judicial, and Constitutional standards. The attorney handling the matter, Philip T. White, of that Unit reviewed the file and recommended favorable action on the request. The file was then submitted for review to William S. Lynch, Chief of the Organized Crime and Racketeering Section, who recommended approval. The file was then sent to me.

I examined the file and forwarded it to the Office of the Attorney General with a detailed recommendation that the authorization be granted. Following approval in the Office of the Attorney General, the Criminal Division dispatched the letter dated February 18, 1971, to Maurice K. Merten advising him that he was authorized to present the application to the court.

I signed Will Wilson's name to the letter of February 18, 1971, in accordance with the authorization of Will Wilson and the standard procedures of the Criminal Division. I regarded the signing of Will Wilson's name as a ministerial act, because Will Wilson had authorized me to sign his name to and dispatch such a letter of authorization in every instance in which the request had been favorably acted upon in the Office of the Attorney General. Will Wilson did not examine either file or expressly authorize either application. Attached is a copy of Will Wilson's affidavit of September 15, 1971, respecting an authorization letter dated June 16, 1969, in which he stated that he had authorized me to sign letters of this nature.

/s/ Henry E. Petersen
HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

Subscribed and sworn to before me this 10th day of February, 1972.

/s/ Audrey Anne Crump

My Commission Expires August 31, 1976

AFFIDAVIT

District of Columbia:

Will Wilson, Assistant Attorney General of the United States, being duly sworn, states:

I am Assistant Attorney General in charge of the Criminal Division of the United States Department of Justice and have been since January 1969.

I have authorized Deputy Assistant Attorney General Henry E. Petersen and Deputy Assistant Attorney General Harold Shapiro to sign my name to letters of authorization for application to United States District Courts for orders under Title 18, United States Code, Section 2518, after such application had been approved by the Attorney General.

The letter authorizing William G. Earle to make an application to the court for an interception order with respect to certain telephones commonly used by Martin and Jesse Sklaroff at Miami International Airport was signed for me by Mr. Petersen pursuant to my authorization. A copy of the carbon copy of this letter presently in the files of the Department of Justice is attached as Exhibit 1.

/s/ Will Wilson
WILL WILSON
Assistant Attorney General
Criminal Division

Subscribed and sworn to before me this 15th day of Sept., 1971.

/s/ Audrey Anne Crump

My Commission Expires August 31, 1976

Typed: June 9, 1969
WW:PTW:lrt

June 16, 1969.

Mr. William G. Earle,
Post Office Box 4139,
160 Northeast Fourth Street,
Miami, Fla.

Dear Mr. Earle: This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an order of the court authorizing the Federal Bureau of Investigation to intercept wire communications to and from four pay telephones at the Miami International Airport near the entrance to Concourse 2 between United and Northwest Airlines counters, carrying phone numbers 691-9981, 691-9566, 691-9797, and 691-9528.

I have reviewed your request and the facts and circumstances detailed in the affidavit of Special Agent Edwin J. Sharp and have determined that probable cause exists to believe that Martin Sklaroff, Jess Sklaroff, and others are engaged in the commission of an offense enumerated in Section 2516 of Title 18, United States Code, to wit: violations of Section 1084 of Title 18, United States Code, and a conspiracy to violate this statute. I have further determined that there exists probable cause to believe that the above person will make use of the described facilities in connection with that offense, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures are unlikely to succeed or are too dangerous to be used.

Accordingly, you are hereby authorized under the power specially delegated to me in relation to the above described offenses by the Attorney General pursuant to the power conferred on the Attorney General by Section 2516, Title 18, United States Code, to make application to a judge of competent jurisdiction for an order pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications from the facilities described above.

Sincerely,

WILL WILSON
Assistant Attorney General.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Cr. No. 71-406 SAW

UNITED STATES OF AMERICA

v.

GEORGE APODACA, *et al.*

AFFIDAVIT

District of Columbia:

John N. Mitchell, being duly sworn, deposes and says:

I held the office of Attorney General of the United States from January 21, 1969, through March 1, 1972.

On February 18, 1971, I approved a request for authority to apply for an interception order in this case and personally initialed a memorandum of that date reflecting my favorable action on the request. I have examined the original of this memorandum and certify that it bears my initials which were personally affixed by me on February 18, 1971. Attached is a copy of my personally initialed memorandum of that date reflecting my favorable action on the request.

My memorandum of approval in this case constituted a notification to the Assistant Attorney General of the Criminal Division that the discretionary action of approving the request to make application to the court for an interception order was taken by me.

/s/ John N. Mitchell
JOHN N. MITCHELL

Subscribed and sworn to before me this 20th day of April, 1972.

/s/ Audrey Anne Crump
My Commission Expires August 31, 1976

Form DJ-150
(Ed 4-26-65)

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

MEMORANDUM

TO : Will Wilson
Assistant Attorney General
Criminal Division

DATE: Feb. 18, 1971

JNM:PTW:lrt

FROM : John N. Mitchell
Attorney General
/s/ J.N.M.

SUBJECT: *Interception Order Authorization*

This is with regard to your recommendation that authorization be given to Maurice K. Merten of the Criminal Division to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a twenty (20) days period to and from telephone number 415-656-7173, located at 220 Carmelita Place, Fremont, California, in connection with the investigation into possible violations of Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4704 and 7237, by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise that power for the purpose of authorizing Maurice K. Merten to make the above-described application.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Cr. No. 71-406 SAW

UNITED STATES OF AMERICA

v.

GEORGE APODACA, ET AL.

AFFIDAVIT

District of Columbia:

Philip T. White, being duly sworn, deposes and says:

This affidavit recites my knowledge concerning the preparation of the memorandum addressed from John N. Mitchell to Will Wilson, dated February 18, 1971. Subject: Interception order authorization, a copy of which is attached.

I have no independent recollection regarding the preparation of the memorandum described above. However, the symbols appearing in the upper right hand corner of the memorandum signify that I composed the text of the memorandum and that my secretary, Lorraine R. Taylor, typed it.

My signed initials on the file copy indicate that I examined and approved the memorandum on or prior to February 18, 1971.

/s/ Philip T. White
PHILIP T. WHITE

Subscribed and sworn to before me this 2 day of June, 1972.

/s/ Jo Ann M. Hall

My Commission Expires January 1, 1977

Form DJ-150
(Ed 4-26-65)

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

MEMORANDUM

TO : Will Wilson DATE: Feb. 18, 1971
Assistant Attorney General
Criminal Division JNM:PTW:lrt

FROM : John N. Mitchell
Attorney General
/s/ J.N.M.

SUBJECT: *Interception Order Authorization*

This is with regard to your recommendation that authorization be given to Maurice K. Merten of the Criminal Division to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a twenty (20) day period to and from telephone number 415-656-7173, located at 220 Carmelita Place, Fremont, California, in connection with the investigation into possible violations of Title 21, United tSates Code, Section 174, and Title 26, United States Code, Sections 4704 and 7237, by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise that power for the purpose of authorizing Maurice K. Merten to make the above-described application.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Cr. No. 71-406 SAW

UNITED STATES OF AMERICA

v.

GEORGE APODACA, ET AL.

AFFIDAVIT

Carl LoPresti, being duly sworn, deposes and says:

This affidavit recites my knowledge concerning the preparation of the memorandum addressed from John N. Mitchell to Will Wilson, dated February 25, 1971. Subject: Interception order authorization, copy attached.

I have no independent recollection regarding the preparation of the memorandum described above. However, the symbols appearing in the upper right hand corner of the memorandum signify that I probably prepared the text of the memorandum and that a secretary, Sandra K. Hauschild, typed it.

My signed initials on the file copies indicate that I examined and approved the memorandum on or prior to February 25, 1971.

/s/ Carl LoPresti
CARL LOPRESTI

Subscribed and sworn to before me this 5th day of June, 1972.

/s/ Lillian M. Fries
Notary Public
LILLIAN M. FRIES, Notary Public
Pittsburgh, Allegheny County, Penna.

My Commission Expires July 17, 1973

Form DJ-150
(Ed 4-26-65)

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

MEMORANDUM

TO : Will Wilson
Assistant Attorney General
Criminal Division

DATE: Feb. 25, 1971

JNM:CLL:skh

FROM : John N. Mitchell
Attorney General
/s/ J.N.M.

SUBJECT: *Interception Order Authorization*

This is with regard to your recommendation that authorization be given to Maurice Merten of the Criminal Division to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a twenty (20) day period to and from telephone number 415-471-7260, located at 1345 G Street, Union City, California, in connection with the investigation into possible violations of Title 21, United States Code, Section 174 and Title 26, United States Code, Sections 4704(a) and 7237(a) by persons identified only as "Pelone," "Jim," "Jesse," "Mondo," "Olivia" and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Maurice Merten to make the above-described application.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Cr. No. 71-406 SAW

[Filed May 31, 1972, C. C. Evensen, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

UMBERTO JOSE CHAVEZ, IRENE CHAVEZ, JAMES FERNANDEZ, ANN FERNANDEZ, OLIVIA MIRAMONTES, JESSE BUSTAMANTE, ARMANDO RAMIREZ, CARMEN RAMIREZ, DELORES FERNANDEZ, GEORGE APODACA, MARGARET APODACA, VERNON BACA, DEFENDANTS

MEMORANDUM AND ORDER

Defendants are charged with violating Federal narcotics laws (21 U.S.C. §§ 173, 174 and 18 U.S.C. § 1952). The question now before the Court concerns the legality of two telephone wiretaps (hereafter the "Chavez wiretap" [1] and the "Fernandez wiretap" [2]), which plaintiff admits were key sources of evidence against defendants.

Defendants move to suppress all evidence gained through the wiretaps, claiming that plaintiff failed to comply with the governing requirements of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, et seq.

That statute evinced the decision of Congress that telephone wiretapping is, in certain circumstances, necessary to curb criminal activity. To insure that rights guaranteed by the Fourth Amendment would not be abused by such tapping, various safeguards were included. Two are

---

[1] The "Chavez wiretap" as initiated pursuant to an order (dated February 18, 1972) of the Honorable Oliver J. Carter, Chief Judge of the Northern District of California.

[2] The "Fernandez wiretap" was initiated pursuant to an order of Chief Judge Carter dated February 25, 1972.

relevant to the question now before the Court. The first provides (in 18 U.S.C. § 2516):

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge . . . for, and such judge may grant in conformity with section 2518 . . . an order authorizing or approving the interception of wire or oral communications . . .

It will be noted that two separate matters are covered. The Section, for one thing, empowers the Attorney General or any Assistant Attorney General specially designated by him *to authorize* application to a Federal judge for approval of a wiretap and, for another, it empowers the Attorney General specially *to designate* any Assistant Attorney General to authorize such an application. It should also be noted that authorizing an application is no mere ministerial act. Under the statute, authorization calls for the exercise of discretion as to whether or not any application should be made.

This careful delineation as to who could authorize an application and the requirement for applications to be authorized were intended to insure that only "a publicly responsible official subject to the political process" could exercise the discretion as to whether or not application should be made to a Federal judge for permission to wiretap. Senate Report 1097, 1968 U.S. Code Cong. & Adm. News at 2185. *See United States* v. *Robinson*, No. 71-1058 (5th Cir., Jan. 12, 1972) at 5-6. For a more complete review of the statutory history, see *United States* v. *Focarile*, Cr. No. 70-0483-M (D. Md., Feb. 22, 1972). A previously proposed bill had provided that *any* officer of the Department of Justice or *any* United States Attorney specially designated could authorize such application. Section 4(b) of S. 1495, in *United States* v. *Focarile*, *supra*, at 34. Even these quite strict proposed requirements, under which the Attorney General could have been held responsible on the theory of his power over subordinates, were not tight enough to satisfy Congress. Congress went further and required that only officers subject to Senatorial confirmation should have the

power to decide whether or not to authorize an application. As Herbert J. Miller, Jr., then Assistant Attorney General, Criminal Division, Department of Justice, testified, the advantage of the § 2516 over § 4(b) of S. 1495 is that the former gives "greater assurance of a responsible executive determination of the need and justifiability of each interception." *Hearings Before the Subcommittee on Constitutional Rights of the Committee of the Judiciary, Wiretapping and Eavesdropping Legislation*, 87th Cong., First Session, at 365, in *United States* v. *Focarile, supra*, at 35. "[I]n itself," the Senate Report states, "[§ 2516] should go a long way toward guaranteeing that no abuses will happen." 1968 U.S. Code Cong. & Adm. News at 2185.

The second relevant statutory provision states (in 18 U.S.C. § 2518):

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication . . . shall state the applicant's authority to make such application. Each application shall include the following information:
>
> > (a) the identity of the investigative or law enforcement officer making the application, *and the officer authorizing the application;*
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> . . .
>
> > (d) the identity of the agency authorized to intercept the communications *and of the person authorizing the application;* [emphasis added].

This plainly requires that both (1) the application to the Court for authorization to wiretap and (2) the order of authorization identify the "authorizing" officer.

The designated requirements are far more than technicalities. They are vital to the statutory scheme by which Congress intended to insure that wiretapping remain a closely regulated procedure, amenable to public

and Congressional scrutiny. As the Court stated in *United States* v. *Focarile*, *supra*, at 40-41:

> Placement of the authority to make the decision of whether or not to authorize an application for a wiretap in the highest level of government and in a publicly responsible official subject to the political process was accomplished by the specific language of § 2516 (1) which had been suggested by the Justice Department in 1961 and which was included in the major subsequent legislative proposals. It was realized, however, as time went on that § 2516(1) dealt only with the *fact of authorization* of the application. As has been seen, subsequent proposals, bit by bit, added the requirement that *the person who actually authorized the application must be made known* to the judge to whom the application was submitted and to those others to whom the contents of his order would be disclosed (see § 2518(4)(d), § 2518(8)(d), and § 2519(1)(f)). Knowledge by the judge, by the persons to whom the contents of the order would ultimately be disclosed, and Congress and the public as a whole through the Reports of the Director of the Administrative Office of the United States Courts provided for in § 2519(3) were deemed to be necessary and appropriate to allow those concerned and interested the opportunity to fix the responsibility for the fact of the authorization of the application in a specific and identifiable person who is subject to the political process. [Footnote omitted.]

The evidence from plaintiff itself shows that the mandates of Congress were not met as to either of the wiretaps here under scrutiny.

In the case of the Chavez wiretap, subordinate officials in the Department of Justice forwarded, to Attorney General John Mitchell, an application requesting authorization to apply to a Federal judge for permission to wiretap. The Attorney General personally initialed a memorandum to Mr. Will Wilson, an Assistant Attorney General, stating:

> Pursuant to the power conferred on me by Section 2516 of Title 18, . . . you are hereby specially designated to exercise that power for the purpose of authorizing Maurice K. Merton [a Special Attorney of the Department of Justice] to make the above-described application.

Although the language of the memorandum appears to designate Mr. Wilson as the Assistant Attorney General to be vested with the discretion to authorize application for the wiretap, the affidavit of Mr. Mitchell, filed herein, declares that he intended the memorandum to be his own authorization for the application. Affidavit of John Mitchell, filed May 4, 1972.[3] The memorandum was then forwarded, with the appropriate file to the office of Mr. Will Wilson. Mr. Wilson, however never examined the file. Mr. Henry Petersen, an assistant to Mr. Wilson, performed the alleged "ministerial act" of signing Mr. Wilson's name to a letter addressed to Maurice K. Merten, authorizing application to a Federal judge. Affidavit of Henry E. Petersen, filed Feb. 11, 1972.

Subsequently, an application for approval of the wiretap was submitted to the Honorable Oliver J. Carter, Chief Judge of this District. The application, signed by Mr. Merten, states, without qualification:

> . . . the Attorney General . . . has specially designated in the proceeding the Assistant Attorney General . . . , The Honorable Will Wilson, to authorize affiant to make this application for an Order authorizing the interception of wire communications. This letter of authorization signed by the Assistant Attorney General is attached to this application. . . .

Chief Judge Carter, appropriately relying on this clear language, approved the application and accordingly stated in his order that the application had been,

---

[3] For present purposes, the Court assumes that the Memorandum to Will Wilson constitutes an authorization under § 2516 and does not reach defendants' contentions (1) that the Memorandum is insufficient on its face to constitute an authorization and (2) that the affidavit is so inconsistent with the wording of the memorandum as to throw doubt on its credibility.

> authorized by the Assistant Attorney General . . . , the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General . . . to exercise the powers conferred on the Attorney General by Section 2516 . . . .

As to the Fernandez wiretap, permission to apply to a Federal judge for approval was also forwarded to the Office of the Attorney General. A memorandum, worded similarly to that quoted above, was dispatched to Will Wilson even though Mr. Mitchell had neither seen nor approved this memorandum. The fact was that the Attorney General's initials were affixed to it by Mr. Sol Lindenbaum, Executive Assistant. He states in his affidavit, filed in this Court February 11, 1972:

> . . . I reviewed the submitted material, concluded that the request satisfied the requirements of the statute and also concluded, from my knowledge of the Attorney General's actions on previous cases, that he would approve the request if submitted to him. Because the Attorney General was not available on this occasion, I approved the request pursuant to the authorization which he had given to me to act in the circumstances and caused his initials to be placed on a memorandum to Will Wilson.

The memorandum was then delivered to Mr. Wilson's office, where, as in the case of the Chavez wiretap, a subordinate performed the alleged "ministerial act" of signing Mr. Wilson's name to a letter authorizing application to a Federal judge. Again, Mr. Wilson never examined the application. Affidavit of Harold P. Shapiro, filed February 11, 1972.

The application to Chief Judge Carter for the Fernandez wiretap states:

> . . . the Attorney General . . . has specially designated in the proceeding the Assistant Attorney General . . ., The Honorable Will Wilson, to authorize affiant to make this application for an Order authorizing the interception of wire communications. This

> letter of authorization signed by the Assistant Attorney General is attached to this application. . .

Chief Judge Carter approved the application, stating in his order, that the application had been:

> authorized by the Assistant Attorney General . . ., the Honorable Will Wilson, who has been specially designated in this proceeding by the Attornew General . . ., to exercise the powers conferred on the Attorney General by Section 2516. . . .

By plaintiff's own admission, it is clear that in the case of both wiretaps: (1) Chief Judge Carter was misinformed by plaintiff as to the name of the individual who had authorized application; and (2) the only individual named in the application had never examined it, much less exercised discretion to authorize it. No clearer evidence could be adduced to show complete frustration of the opportunity for Congressional and public scrutiny required by the statute as a means to protect Fourth Amendment rights. The applications for these wiretaps (as well as the orders relying on them) erroneously show that they were authorized by the same man. In fact, neither of the individuals who authorized the applications was in any way identified to Chief Judge Carter, Congress or the public. Evidence secured through the wiretaps must therefore be suppressed for failure to follow the Congressional mandate set out in §§ 2518(1)(a) and 2518(4)(d). *United States* v. *Focarile, supra*, at 46-48; *United States* v. *Casale*, Cr. No. 14927 (M.D. Pa., April 8, 1972).

In regard to the Fernandez wiretap, the government also admits that neither the Attorney General nor a specially designated Assistant Attorney General ever authorized the application. Where rights so fundamental as those protected by the Fourth Amendment are concerned, non-compliance with a federal statute intended to protect those rights cannot be excused. Good faith simply is not sufficient. *United States* v. *Robinson, supra; United States* v. *Cihal*, 336 F. Supp. 261 (W.D. Pa. 1972); *United States* v. *Aquino*, 338 F. Supp. 1080 (E.D. Mich. 1972); *United Sattes* v. *Baldassari*, 338 F. Supp. 904 (M.D. Pa. 1972).

IT IS HEREBY ORDERED that the wiretap communications intercepted pursuant to the orders of Court dated February 18, 1971, and February 25, 1971, and the fruits thereof, are suppressed.

Dated: May 30, 1972.

/s/ Stanley A. Weigel
Judge

SUPREME COURT OF THE UNITED STATES

No. 72-1319

UNITED STATES, PETITIONER

v.

UMBERTO JOSE CHAVEZ, ET AL.

ORDER ALLOWING CERTIORARI—Filed May 21, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 506488 688

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

UMBERTO JOSE CHAVEZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1973 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a case where the Attorney General personally authorized the submission of one of two wiretap applications to the district court, the procedures followed in the Department of Justice in authorizing applications for wiretap orders and identifying the officer authorizing the wiretap application were sufficient to comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

2. Whether, if the procedures followed were improper, suppression of the wiretap evidence is required in this case.

STATUTES INVOLVED

18 U.S.C. 2516 provides in pertinent part:

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, * * *

* * * * *

18 U.S.C. 2518 provides in pertinent part:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall

state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

* * * * * * *

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; * * *

* * * * *

STATEMENT

1. The defendants in this case were charged with a conspiracy involving the importation of heroin into the United States in violation of 21 U.S.C. (1964 ed.) 173 and 174. Additionally, defendant Chavez was charged with using a telephone in foreign commerce to promote an unlawful narcotics business in violation of 18 U.S.C. 1952, and defendant Fernandez was charged with traveling in foreign commerce with the same purpose, also in violation of 18 U.S.C. 1952. Prior to trial, the government notified the defendants that it intended to use at trial evidence obtained from court-authorized wire interceptions and court-author-

ized pen registers conducted under court orders of February 18, 1971, and February 25, 1971.[1] The former order authorized interceptions of a telephone listed under the name of defendant Chavez and the latter order allowed interceptions of a telephone listed under the name of defendant Fernandez. The defendants filed various motions to suppress, including motions challenging the procedure under which the applications were authorized within the Department of Justice. The government opposed these motions and filed affidavits similar to those filed in *United States* v. *Giordano,* No. 72–1057, this Term, certiorari granted, March 26, 1973, and *United States* v. *Richard Michael King,* petition for a writ of certiorari being filed simultaneously with this petition, describing the procedure followed.[2]

The first interception request here, culminating in the February 18, 1971 wiretap of the Chavez telephone, was personally approved by the then Attorney General John N. Mitchell, for submission to the district court (App. A, *infra,* p. 3a). The second request—the application for the February 25, 1971 wiretap of the Fernandez telephone—was made when the Attorney General was not available and was authorized by the Executive Assistant to the Attorney Gen-

[1] A pen register is a device used in conjunction with an interception of a telephone to record the telephone numbers of the outgoing telephone calls from the intercepted telephone.

[2] Affidavits of John N. Mitchell, former Attorney General, Sol Lindenbaum, Executive Assistant to the Attorney General, Henry E. Petersen, Assistant Attorney General, Criminal Division (formerly Deputy Assistant Attorney General), and Harold Shapiro, Deputy Assistant Attorney General, Criminal Division, were filed.

eral, Sol Lindenbaum, who concluded from his knowledge of the Attorney General's actions in previous cases that the latter would approve the request. These requests had previously been reviewed by a Unit of the Organized Crime and Racketeering Section of the Criminal Division, the Deputy Chief or Chief of that Section and a Deputy Assistant Attorney General.

In both instances, after approval by the Attorney General's office, a memorandum was addressed to the Assistant Attorney General in charge of the Criminal Division, Will Wilson, informing him of the approval and designating him to authorize the trial attorney in the field to submit the application to the district court. Letters were then sent to the trial attorney over Assistant Attorney General Wilson's signature (which was affixed, pursuant to his standing directions, by a Deputy Assistant Attorney General), advising the trial attorney that he was authorized to file a wiretap application in the district court. The applications filed in court stated that the Attorney General "has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant [Justice Department trial attorney] to make this application for an Order authorizing the interception of wire communications. This letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A" (App. A, *infra*, p. 5a). Thereafter, the court found probable cause and issued wire interception or-

ders. These orders specified that government agents were authorized to act pursuant to the application authorized by Assistant Attorney General Wilson "who has been specially designated in this proceeding by the Attorney General * * * to exercise the powers conferred on the Attorney General by Section 2516 of Title 18 * * *" (App. A, *infra*, p. 6a).

2. After a hearing on the motions to suppress, the district court entered an order suppressing the wiretap evidence and its fruits. As to the first wiretap, it found that the application and order did not properly identify the officer authorizing the application as required by 18 U.S.C. 2518(1)(a) and (4)(d). As to the second wiretap, it found that the application was not properly authorized as required by 18 U.S.C. 2516(1).

On the government's appeal, the court of appeals affirmed. It ruled, as to the first wiretap which had been approved by the Attorney General, that while it was properly authorized under section 2516(1), it was legally defective because the application for the order and the order itself misidentified the officer who had authorized the application, in violation of section 2518 (1)(a) and (4)(d). It found that the purpose of the latter section was to fix responsibility in "only a few specifically identified and publicly responsible officials" in order to avoid an "institutional decision," and that the form of application for the orders in this case "has the defect of obscuring from public view the identity of the persons making the decision and the factors which influenced their formulation of policy" (App. A, *infra*, p. 9a). It concluded that sup-

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pression was necessary to avoid countenancing "an apparently deliberate deception of the courts by the highest law officers of the land" (App. A, *infra*, p. 10a). As to the second wiretap, the court below rested its decision on *United States* v. *King*, *supra*, and held that section 2516(1) did not permit the Attorney General's Executive Assistant to authorize the application on behalf of the Attorney General, even with the latter's general approval.

REASONS FOR GRANTING THE WRIT

1. The court below in its ruling on the first wiretap order goes beyond the Fourth Circuit's decision in the *Giordano* case, No. 72–1057, which the Court on March 26, 1973, agreed to review. It is the first appellate court decision that a wiretap order based on probable cause is illegal and its fruits subject to suppression because the application for the order identified the Assistant Attorney General in charge of the Criminal Division as the person within the Department of Justice who authorized its filing when in fact the Attorney General personally did so. In so holding, the court below has construed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 in conflict with decisions by the Courts of Appeals for the Second, Third and Eighth Circuits. *United States* v. *Cox*, 462 F.2d 1293 (C.A. 8), petition for a writ of certiorari pending, No. 72–5278; *United States* v. *Ceraso*, 467 F. 2d 647 (C.A. 3); *United States* v. *Cafero*, Nos. 72–1577 and 72–1578 (C.A. 3), decided January 30, 1973; *United States* v. *Fiorella*, 468 F. 2d 688 (C.A. 2), petition for a writ of certiorari pending, No. 72–863;

United States v. *Pisacano*, 459 F. 2d 259 (C.A. 2), petition for a writ of certiorari pending, No. 71–1410; *United States* v. *Becker*, 461 F. 2d 230 (C.A. 2), petition for a writ of certiorari pending, No. 72–158; *United States* v. *Wright*, 466 F. 2d 1256 (C.A. 2), certiorari denied January 22, 1973, No. 72–5665.[3]

2. Our petition in *Giordano* sets forth the reasons why we believe this Court should review the validity of the procedures followed by the Department of Justice in applying for wiretap orders and why we contend that there is no justification for suppressing the fruits of otherwise valid wiretaps even if those internal executive procedures were not in literal compliance with the wiretap statute. Those reasons, while particularly directed in *Giordano* to an application for a wiretap order in which the Executive Assistant to the Attorney General approved the submission of the application to the district court (the second wiretap application here), likewise tend to sustain an application where the Attorney General himself has approved its submission to the district court (the first wiretap application here). As we there point out, the purpose of both the authorizing section, 18 U.S.C. 2516(1), and

[3] In view of this newly developed conflict and our filing of the present petition, we are filing supplemental memoranda in *Cox* and *Fiorella*, withdrawing our opposition to certiorari in those cases. Since *Becker* and *Pisacano* involve authorizations by the Executive Assistant to the Attorney General, Mr. Lindenbaum, as well as by the Attorney General, we have already filed memoranda, in conjunction with our petition in *Giordano*, withdrawing our opposition to certiorari in those cases. We are also filing a petition for a writ of certiorari to review the decision by the court below in *United States* v. *King*, which follows *Giordano*.

the provisions which require the authorizing officers to be identified in the application and order, 18 U.S.C. 2518(1)(a) and (4)(d), was to fix responsibility for the policy decision to apply for the wiretap. We submit that the Justice Department's former procedures sufficiently complied with this congressional purpose. Our argument in support of this assertion is summarized in our *Giordano* petition, a copy of which we are serving on respondents.

3. The suppression of the first wiretap order in the present case illustrates the harshness of the application of the exclusionary rule. The first wiretap order was based on a finding of probable cause by a district court on an application which had been personally authorized within the Department of Justice by the Attorney General himself. The courts below have ordered the fruits of this wiretap suppressed because the letter sent to the field attorney notifying him that he was authorized to apply for court approval of a wiretap inaccurately indicated that the authorization represented the decision of an Assistant Attorney General when it actually was the decision of the Attorney General personally. To say, as did the court below, that this was "deliberate deception of the courts by the highest law officers in the land" ignores the crucial fact that this impression was immaterial to the determination of probable cause and necessity required of the district court, and to the right of the persons subject to the wiretap that there be no unwarranted invasion of their privacy.

Finally, if the ruling of the Ninth Circuit is allowed to stand by this Court, it will result in suppression of

wiretap evidence in all cases in that circuit where the application was submitted prior to early 1972 when the Department of Justice changed its procedures in response to the objections raised to the former procedures by the Fifth Circuit in *United States* v. *Robinson*, 468 F. 2d 189 (1972), panel decision vacated and case remanded for evidentiary hearing following rehearing *en banc*, January 16, 1973.[4] Unless reversed, the decision below will abort a substantial number of major prosecutions in the organized crime and narcotics areas based on evidence secured with full respect for the Fourth Amendment interests of the defendants. Hypertechnical construction of the wiretap statute should not be allowed to bar these prosecutions.

CONCLUSION

Because of the explicit conflict among the circuits and the substantial practical importance of the issues, this petition for a writ of certiorari should be granted. The ruling here in suppressing the applica-

[4]As we have noted in earlier memoranda and certiorari petitions dealing with authorizations by the Attorney General's Executive Assistant, such authorizations on behalf of the Attorney General have not been permitted since November 20, 1971. In early 1972, the procedures were further revised. Under the procedures followed since that time, after the Attorney Generally personally authorizes the filing of the application, he then personally signs a memorandum to the Assistant Attorney General in charge of the Criminal Division, directing him to notify the trial attorney of the authorization. The Assistant Attorney General thereupon personally signs a letter to the trial attorney, notifying him that the Attorney General has authorized the application. Both the letter from the Assistant Attorney General and the memorandum from the Attorney General are attached to the application submitted to the district court.

tion authorized by the Attorney General himself involves a different facet of the problem presented in *Giordano*—here the issue is the consequence of inaccurate statements regarding the identity of the authorizing officer, whereas in *Giordano* the issue is the effect of action taken by the Attorney General's Executive Assistant. We therefore suggest that certiorari should be granted in this case and that the case should be heard along with *Giordano*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
HARRIET S. SHAPIRO,
Assistant to the Solicitor General.
SIDNEY M. GLAZER,
JOHN J. ROBINSON,
Attorneys.

MARCH 1973.

APPENDIX A

United States Court of Appeals
For The Ninth Circuit
No. 72-2240

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

UMBERTO JOSE CHAVEZ, ET AL.,
DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of California

Decided February 28, 1973

Before BARNES, BROWNING AND DUNIWAY, Circuit Judges

DUNIWAY, *Circuit Judge*: This case is in most respects similar to *United States v. King*, 9 Cir., 1973, —— F.2d ——, decided today. However, it differs in one important respect.

Umberto Chavez, James Fernandez, and ten others were indicted for conspiring to import and distribute heroin in the United States, a violation of 21 U.S.C. §§ 173, 174. Chavez and Fernandez were also charged with various activities prohibited by 18 U.S.C. § 1952. The government's case was largely derived from two wiretaps, one of Fernandez' telephone in Union City, California, and one of Chavez' telephone in Fremont, California. The district court held that these wiretaps had been conducted in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968,

18 U.S.C. §§ 2510–2520, and ordered their fruits suppressed. The government appeals under 28 U.S.C. § 3731; we affirm.

The procedures by which the Fernandez tap was authorized are identical to those described in *United States* v. *King, supra.* As in *King,* the application to the district judge identified Assistant Attorney General Will Wilson as designated by the Attorney General under 18 U.S.C. § 2516 to authorize the application. It was accompanied by a Will Wilson letter substantially the same as that in *King.* As in *King,* the District Judge's order identified Wilson as the person authorizing the application. As in *King,* practically everything stated in the Wilson letter is false. As in *King* there are affidavits by Harold Shapiro, Sol Lindenbaum and Will Wilson. There is no affidavit by former Attorney General Mitchell, but this is immaterial because the Lindenbaum affidavit fully discloses that the Attorney General had chosen not to designate an Assistant Attorney General to authorize applications for interceptions, but had required that all such applications be referred to him for consideration. It also discloses that it was Lindenbaum, not Mitchell, who approved the application. As in *King,* there is a Memorandum, purportedly from Mitchell but actually from Lindenbaum, to Wilson. The relevant content of all of these papers is practically identical to the content of those in *King.* This is the proverbial "spotted cow" case. As to the Fernandez tap, the order must be affirmed for the reasons stated in *King.*

However, the Chavez tap presents the issue that we expressly reserved in *King,* namely, whether misidentification of the person who authorized the applica-

tion for a wiretap requires suppression of its fruits. —— F.2d at —— p. 4. In the application by the Justice Department attorney Merten to the District Judge there is the same recital about Wilson as in *King* and there is the same Wilson letter. There is the same identification of Wilson in the Judge's order. The Wilson letter is just as false as that in *King*. As in *King*, there are affidavits. One is by Henry E. Petersen, who was at the time a Deputy Attorney General in charge of the Criminal Division of the Department of Justice. It is substantially the same as the Shapiro affidavit in *King*. The Lindenbaum affidavit is like that in *King*, but, as to the Chavez tap, it says:

> On February 16, 1971, and February 25, 1971, the Criminal Division of the Department of Justice addressed to the Attorney General requests for approval of authorization to apply for interception orders with respect to certain telephones in California. The first request related to a telephone in Fremont, California, allegedly used by Umberto Jose Chavez and others. The second related to a telephone in Union City, California, allegedly used by a person identified only as "Pelone" and others. In each instance, the request was accompanied by copies of the proposed affidavit, application, and order, as well as a recommendation for approval from the Criminal Division.
>
> With respect to the first, the Attorney General on February 18, 1971, approved the request that the authorization be given to Maurice Merten to make application for an interception order with respect to the mentioned telephone in Fremont, California. Attached is a copy of the Attorney General's personally initialed memorandum of that date to Will Wilson reflecting his favorable action on the request.

The Wilson affidavit is like that in *King*. There is an affidavit by former Attorney General Mitchell, which we quote in full:

> John N. Mitchell, being duly sworn, deposes and says:
>
> I held the office of Attorney General of the United States from January 21, 1969, through March 1, 1972.
>
> On February 18, 1971, I approved a request for authority to apply for an interception order in this case and personally initialed a memorandum of that date reflecting my favorable action on the request. I have examined the original of this memorandum and certify that it bears my initials which were personally affixed by me on February 18, 1971. Attached is a copy of my personally initialed memorandum of that date reflecting my favorable action on the request.
>
> My memorandum of approval in this case constituted a notification to the Assistant Attorney General of the Criminal Division that the discretionary action of approving the request to make application to the court for an interception order was taken by me.

The attached Memorandum is as follows:

> Date: Feb. 18, 1971.
>
> To: WILL WILSON.
> *Assistant Attorney General,*
> *Criminal Division.*
> From: JOHN N. MITCHELL,
> *Attorney General.*
> Subject: *Interception Order Authorization*
>
> This is with regard to your recommendation that authorization be given to Maurice K. Merten of the Criminal Division to make application for an Order of the Court under Title 18, United States Code, Section 2516, permitting the interception of wire communications for a twenty (20) day period to and from telephone

number 415—656–7173, located at 220 Carmelita Place, Fremont, California, in connection with the investigation into possible violations of Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4704 and 7237, by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise that power for the purpose of authorizing Maurice K. Merten to make the above-described application.

It is apparent that the only difference between the authorization of the Chavez tap and the authorization of the *King* taps are these. First, the Attorney General did see the request for an authorization and did approve the request. Second, he personally initialled the memorandum to Wilson.

Nevertheless, we are as much struck by the contrast between the contents of the affidavits and the recitals in the Mitchell memorandum, the Wilson letter, and the Merten application as we were in *King*.

The Merten application to the District Judge recited:

> 3. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, The Honorable Will Wilson, to authorize affiant to make this application for an Order authorizing the interception of wire communications. This letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

This recital is entirely consistent with the Attorney General's memorandum of February 18, 1971, quoted above, but is hardly consistent with what the former Attorney General now says in his affidavit, or with the Lindenbaum affidavit. The Wilson letter attached to the application, recites:

> Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to section 2516 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, United States Department of the Treasury, to intercept wire communications from the facility described above, for a period of twenty (20) days.

It also recites review of the request for authorization by Wilson, not Mitchell, and determinations made by Wilson, not Mitchell.

Undoubtedly these representations caused the judge to state in his order:

> Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury, are authorized, pursuant to the application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, * * *

As we said in *King, supra,* we can see no rational explanation for the elaborate paper charade of the Mitchell memorandum, the Wilson letter, and the Merten application, unless it be to deceive the Congress and the court. That it did deceive the Judge, we have no doubt.

The rather extraordinary discrepancies between the application, the Wilson letter and the Mitchell memorandum, on the one hand, and the affidavits, on the other, led counsel to argue to the District Judge that he should find, contrary to Mitchell's *ex post facto* affidavit, that Mitchell had not personally approved the request. This, however, the Judge refused to do. He assumed that Mitchell had approved it, and so do we. Thus there was substantial compliance with Section 2516(1).

However, there certainly was not compliance with Section 2518(1)(a) which requires that "Each application for an order * * * shall * * * include * * * the identity of * * * the officer authorizing the application," or with Section 2518(4)(d) which requires that the order do likewise. There was not merely an omission of the required information; there was a misrepresentation, in circumstantial and carefully phrased detail, all pointing to Wilson as the officer authorizing the application, when in fact he did no such thing.

The government argues that there has been "substantial compliance" with Section 2518. Pointing to the legislative history of the Act, which states that Section 2518(1)(a) and (4)(d) were designed to "fix responsibility" for the authorization of wiretaps, it argues that the responsible official is "reasonably identifiable" since the "lines of responsibility lead to" Attorney General Mitchell. It relies heavily upon the fact that most courts which have faced the precise

question involved here have refused to order suppression.[1]

We are not persuaded, either by the argument or the cases. Although we agree that the purpose of Section 2518(1)(a) and (4)(d) was to fix responsibility, *see* S. Rep. No. 1097, *quoted in* 1968 U.S. Code Cong. & Admin. News 2112, 2189, 2192, we do not believe that this means the general responsibility of an agency head for the actions of his subordinates. The phenomenon of the "institutional decision is familiar to anyone who has had dealings with a bureaucracy. Basically, it is a decision which, although signed by a publicly responsible official, is made by the organization rather than by the official. *See generally* B. Schwartz, in Introduction to American Administrative Law 144-48 (1962), 2 K. Davis, Administrative Law Treatise § 11 at 36–38 (1958). Such a decision may be justified by the press of agency business or the expertise of the

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[1] The vast majority of courts have either accepted the government's argument that Section 2518 has been substantially complied with, or have held that any violation was harmless. *United States v. Ceraco*, 3 Cir., 1972, 467 F. 2d 647; *United States v. Cox*, 8 Cir., 1972, 462 F. 2d 1293, 1297–1300; *United States v. Becker*, 2 Cir., 1972, 461 F. 2d 230, 235; *United States v. Pisacano*, 2 Cir., 1972, 459 F. 2d 259, 263; *United States v. Whitaker*, E. D. Pa., 1972, 343 F. Supp. 358; *United States v. Consiglio*, D. Conn., 1972, 342 F. Supp. 556; *United States v. Doolittle*, M.D. Ga., 1972, 341 F. Supp. 163; *United States v. D'Amato*, E.D. Pa., 1972, 340 F. Supp. 1020, 1021; *United States v. Iannelli*, W. D. Pa., 1972, 339 F. Supp. 171, 174; *United States v. Aquino*, 1972, E. D. Mich, 338 F. Supp. 1080, 1081; *United States v. LaGorga*, W. D. Pa., 1971, 336 F. Supp. 190, 195; *United States v. Cantor*, E. D. Pa., 1971, 328 F. Supp. 561. *Contra*, *United States v. Focarile*, D. Md., 1972, 340 F. Supp. 1033, 1051–60, *aff'd. sub. nom. United States v. Giordano*, 4 Cir., October 31, 1972, —— F.2d ——. We find it significant that Judge Miller's opinion in *Focarile* is the only one cited above which attempts a detailed inquiry into the purpose of Section 2518 and its relationship to Section 2516(1).

agency staff. However, it has the defect of obscuring from public view the identity of the persons making the decision and the factors which influenced their formulation of policy. Because of the sensitive nature of wiretapping and the grave threat to privacy which it represents, *see United States v. King, supra,* —— F.2d at, —— we conclude that Congress intended to eliminate any possibility that the authorization of wiretap applications would be institutional decisions. It therefore provided that only a few specifically identified and publicly responsible officials could make such decisions 18 U.S.C. § 2516(1), and that their identity must be disclosed in the application and court order. 18 U.S.C. § 2518(1)(a) and (4)(d).

For us to sanction the procedure used in this case would be to defeat the Congressional scheme. As we have shown, the application, order, affidavits, and memoranda submitted to the District Court in connection with the motion to suppress are contradictory. The court would have to engage in considerable sifting and evaluating to determine which of the rather substantial cast of characters actually approved Merten's request, and even then it could not be certain. It is precisely this type of "button, button, who's got the button" guessing game that is characteristic of the institutional decision, and that Congress intended to eliminate by Section 2518(1)(a) and (4)(d).

The government's argument suffers from a second defect. Although former Attorney General Mitchell assumed responsibility after the fact in this case, were we to approve this procedure there would be nothing to prevent future Attorneys General from remaining silent if a particular wiretap proved embarrassing. *Cf. United States v. Giordano, supra* note 1, —— F.2d at ——. The Wilson letter and the Mitchell memorandum were carefully drawn to create the illusion of

compliance with the Act. Without Mitchell's affidavit, the lines of responsibility lead to Wilson, not to Mitchell. The quality of administrative action increases when officials know that their decisions cannot escape direct scrutiny by the courts, Congress, and the public. *See* K. Davis, Discretionary Justice 111–16 (1969). We refuse to read the safeguard of openness out of the Act, contrary to Congressional intent, by emasculating Section 2518(1)(a) and (4)(d).

In sum, we hold that the identification requirements of Section 2518 (1)(a) and (4)(d) complement the authorization requirement of Section 2516(1). Without the former, the latter would be meaningless: it would be impossible to determine whether the Attorney General or one of his nine Assistant Attorneys General or someone else was actually responsible for the decision to authorize application for a wiretap. Despite the authority to the contrary, we refuse to interpret the authorization requirement strictly, *see United States v. King, supra,* and to wave away the identification provisions as mere technicalities. To do so in this case would be to countenance an apparently deliberate deception of the courts by the highest law officers in the land. The Supreme Court, the Courts of Appeals and the District Courts have traditionally relied upon the integrity of representations made to them by such officers. If we were to uphold what they did here, the door would be open to similar behavior in other cases, and the trust of the courts in the Attorney General and his Assistant Attorneys General, so vital to the efficient and effective conduct of judicial business, would soon be destroyed.[2]

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[2] The one commendable thing that we find in this case is the apparent candor of the former Attorney General and his subordinates, once the problem was brought to light. We rely on their affidavits, as did the District Judge.

In his Memorandum and Order granting the motions to suppress in this case Judge Weigel said:

> *By plaintiff's own admission, it is clear that in the case of both wiretaps*: (1) Chief Judge Carter was misinformed by plaintiff as to the name of the individual who had authorized application; and (2) the only individual named in the application had never examined it, much less exercised discretion to authorize it. No clearer evidence could be adduced to show complete frustration of the opportunity for Congressional and public scrutiny required by the statute as a means to protect Fourth Amendment rights. The applications for these wiretaps (as well as the orders relying on them) erroneously show that they were authorized by the same man. In fact, neither of the individuals who authorized the applications was in any way identified to Chief Judge Carter, Congress or the public. Evidence secured through the wiretaps must therefore be suppressed for failure to follow the Congressional mandate set out in §§ 2518(1)(a) and 2518(4)(d).

We agree.

The order appealed from is affirmed.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 72-2240

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, *vs.* UMBERTO JOSE CHAVEZ, ET AL. DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered February 28, 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1319

UNITED STATES OF AMERICA, PETITIONER

v.

UMBERTO JOSE CHAVEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-11a) is not yet reported. The opinion of the district court (A. 99-106) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1973 (Pet. App. B). The petition for a writ of certiorari was filed on March 29, 1973 and was granted on May 21, 1973 (A. 107). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether suppression of probative evidence is the appropriate or necessary way of dealing with any former inconsistencies between the Justice Department's internal review of proposed wire interception

applications, before their submission to a federal judge, and the procedures outlined for this purpose by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, when these procedures had no bearing on the judge's determination of probable cause and necessity and were, in any event, revised more than a year ago.

2. Whether, in a case where the Attorney General personally authorized the submission of the first of two wire interception applications to the district court, and his Executive Assistant exercised delegated authority to approve the second application, the procedures followed by the Department of Justice in authorizing the applications and identifying the officer authorizing them complied with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

STATUTES INVOLVED

The statutes involved are set forth in the appendix to our brief in *United States* v. *Giordano*, No. 72-1057.

STATEMENT

1. Respondents were charged with a conspiracy involving the importation of heroin into the United States in violation of 21 U.S.C. (1964 ed.) 173 and 174. Additionally, respondent Chavez was charged with using a telephone in interstate commerce to promote an unlawful narcotics business in violation of 18 U.S.C. 1952, and respondent Fernandez was charged with traveling in foreign commerce with the same purpose, also in violation of 18 U.S.C. 1952. Prior to trial, the government notified the defendants that it intended to use at trial evidence obtained from wire interceptions and pen registers[1] conducted under court orders of

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[1] A pen register is a device used to record the telephone numbers of outgoing telephone calls.

February 18, 1971, and February 25, 1971, which had been issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520).

The earlier order authorized interceptions of a telephone listed under the name of defendant Chavez and the later order authorized interception of one listed under the name of defendant Fernandez. The orders specified that the interceptions were to continue for a period not to exceed twenty days from the date of the order; both were terminated on February 27, 1971.

The defendants filed various motions to suppress, including motions challenging the procedure under which the applications for those orders had been authorized within the Department of Justice (A. 68-80). The government opposed these motions and filed affidavits (similar to those filed in *United States* v. *Giordano*, No. 72-1057) describing the procedure followed.[2]

The first interception request, leading to the February 18 wiretap of the Chavez telephone, was personally approved by the then Attorney General, John N. Mitchell, for submission to the district court (A. 93).[3]

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[2] Affidavits of former Attorney General John N. Mitchell; Sol Lindenbaum, Executive Assistant to the Attorney General; Henry E. Petersen, Assistant Attorney General, Criminal Division (formerly Deputy Assistant Attorney General); and Harold Shapiro, Deputy Assistant Attorney General, Criminal Division, were filed. The procedures followed and the delegation to Mr. Lindenbaum of authority to act for the Attorney General are described in detail at pp. 4-9 of our brief in *Gioradano, supra.*

[3] The file contained the proposed supporting affidavit (A. 13-38) which showed that Umberto Chavez had been the subject of a narcotics investigation for some time and had several prior

The second request—the application for the February 25 interception order involving the Fernandez telephone—was made when the Attorney General was not available and was authorized by the Executive Assistant to the Attorney General, Sol Lindenbaum, who had been authorized by the Attorney General to act for him in these situations and concluded from his knowledge of the Attorney General's actions in previous cases that the latter would have approved the request (A. 82).[4]

In both instances, after approval in the Attorney General's office, a memorandum was sent to the Assistant Attorney General in charge of the Criminal Division, Will Wilson, informing him of the approval and designating him to authorize the trial attorney in the field to submit the application to the district court

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narcotics convictions (A. 15-16). Information from a confidential informant showed that Chavez told the informant that he regularly received 120 ounces of high grade heroin at three week intervals, adulterated it, packaged it in unlubricated rubber prophylactics and distributed it throughout northern California (A. 18-19). Another confidential informant said that he had purchased heroin in such packages from Chavez on more than 100 occasions, by telephoning Chavez at his residence (A. 19-20). The information furnished by the informants was corroborated by the fact that Chavez regularly purchased unusually large quantities of prophylactics from pharmacies (A. 17-18).

[4] The affidavit in support of the application for the second wiretap order (A. 52-57) recited in detail the results of the interception of the Chavez telephone. Numerous telephone calls involving discussions of narcotics transactions in code had been intercepted, including calls to respondent Fernandez's number which indicated that he was deeply involved in the distribution of narcotics (A. 55-56). Several calls involved instructions concerning the time, method of delivery and sale of narcotics. In one call arrangements were made for an exchange of money at a local dump as part of a narcotics transaction. Chavez met Fernandez at the dump, and Fernandez then went to the Oakland, California, airport where he boarded a plane for San Diego (A. 56a).

(A. 83-84). Letters were then sent to the trial attorney over Assistant Attorney General Will Wilson's signature (which was affixed pursuant to his standing directions by a Deputy Assistant Attorney General (A. 85-92)) advising the trial attorney that he was authorized to file a wire interception application in the district court (A. 11-12, 50-51). The applications filed in court stated that the Attorney General

> has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant [Justice Department trial attorney] to make this application for an Order authorizing the interception of wire communications [A. 6-7, 45].

Thereafter, the court found that the accompanying affidavit established the requisite probable cause and necessity and issued wire interception orders, which specified that the application had been authorized by Assistant Attorney General Wilson, "who has been specially designated in this proceeding by the Attorney General * * * to exercise the powers conferred on the Attorney General by Section 2516 of Title 18 * * *" (A. 40, 59-60).

After a hearing, the district court suppressed the wiretap evidence and its fruits. It found that the application and order for the first wiretap did not properly identify the officer authorizing the application, and that the application for the second order, which had been passed upon by the Attorney General's Executive Assistant, had not been properly authorized.

On the government's appeal, the court of appeals affirmed. It ruled with respect to the first interception —the Chavez tap—which had been approved by the then

Attorney General, that while it was properly authorized under Section 2516(1), it was legally defective because the application for the order and the order itself misidentified the officer who had authorized the application, and thus violated Section 2518(1)(a) and (4)(d). It found that the purpose of that section was to fix responsibility in "only a few specially identified and publicly responsible officials," and that the form of application for the orders in this case "has the defect of obscuring from public view the identity of the persons making the decision and the factors which influenced their formulation of policy" (Pet. App. A, p. 9a). Moreover, the court was concerned, as was the Fourth Circuit in *Giordano*, with the possibility that the procedure would permit future Attorneys General to disavow the actions of their subordinates (Pet. App. A, pp. 9a-10a). It concluded that suppression was therefore necessary.

With respect to the second interception order—the Fernandez tap—the court of appeals relied on its prior decision in *United States* v. *King*, petition for a writ of certiorari pending, No. 72-1320, which agreed with the reasoning of the Fourth Circuit in *Giordano*, *supra*, and held that Section 2516(1) did not permit the Attorney General to delegate to his Executive Assistant the authority to approve applications on his behalf, even when the Attorney General was not personally available.

SUMMARY OF ARGUMENT

The facts and issues in the present case are similar to those in *United States* v. *Giordano*, No. 72-1057, and we rely here on Parts I and II of our Summary of Argument in our brief in that case, pp. 20-24.[5]

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[5] We are furnishing counsel for respondents with copies of our *Giordano* brief.

ARGUMENT

For the two major questions in this case, we rely primarily on the arguments in our brief in the *Giordano* case. We there contend that no reason of constitutional law, statutory interpretation, or public policy would justify suppression of reliable evidence secured with full regard for the individual's right of privacy after a federal judge has made a valid finding of probable cause and necessity. In addition, we also contend that the preliminary processing procedures for these applications—which were changed more than a year ago—complied with Title III.

Indeed, the suppression of the fruits of the first order in the present case illustrates the harshness of the application of the exclusionary rule. The first order was based on a finding of probable cause by a district court on an application which had been personally authorized within the Department of Justice by the Attorney General himself. The court below ordered the fruits suppressed because the letter sent to the field attorney notifying him that he was authorized to apply for court approval of a wiretap inaccurately indicated that the authorization represented the decision of an Assistant Attorney General when it actually was the personal decision of the Attorney General. To say, as did the court below, that this was "deliberate deception of the courts by the highest law officers in the land" (Pet. App. A, p. 10a) is not only completely unfounded but also ignores the crucial facts that this identification was immaterial to the determination of probable cause and necessity the district court was called upon to make, and immaterial to the right of the persons potentially subject to the court order that there be no unwarranted invasions of their privacy. Those personal rights were

fully protected by the screening of the application that actually took place within the Department of Justice and by the determinations of probable cause and necessity made by the judge on the basis of sworn affidavits whose accuracy and veracity is unchallenged.

This case also illustrates our point that it was within the Attorney General's power under Title III to delegate to his Executive Assistant—the senior official in his Office—the responsibility to act on proposed applications when the Attorney General was not personally available to act on them. The Attorney General entrusted this power to his Executive Assistant only after it had become clear from their working relationship that the Executive Assistant was fully familiar with the Attorney General's policies and decisions in these matters and would act in the same way he would have. In this case, the Executive Assistant acted only after the Attorney General himself had approved the first application, and he had even more information about the nature and scope of the smuggling operation before him than had the Attorney General—or the first district judge, for that matter—in concluding that there was a legitimate basis for seeking a wire interception.

These considerations show, we submit, why the rule of law would not be served by suppressing reliable and probative evidence of guilt in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1973.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1319

UNITED STATES OF AMERICA,

Petitioner,

v.

UMBERTO JOSE CHAVEZ, *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT GEORGE APODACA

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT GEORGE APODACA

OPINION BELOW

The opinion of the Court of Appeals has now been reported at 478 F.2d 512. The opinion of the District Court is not yet reported.

STATEMENT

Respondent accepts the government's statement of the case, but reserved in the District Court the right to subpoena former Attorney General Mitchell on the issue of whether he "personally approved" the first request (R. 330), if that fact was essential to the decision.

SUMMARY OF ARGUMENT

The facts and issues in the present case are similar to those in *United States v. Giordano*, No. 72-1057, and we rely upon the Respondent Giordano's Brief in that case.

ARGUMENT

Counsel for the respondent Apodaca has been furnished the final draft of the Giordano Brief submitted for printing, and asks leave to adopt that brief on the basic issues in this case. For the sake of brevity, respondent will limit this brief to issues believed responsive to the Government's Chavez Brief.

The government proceeds on the assumption that both Courts below clearly *held* that the initialing of the Chavez memorandum by Attorney General Mitchell was a sufficient, "proper" authorization in full compliance with the provisions of Section 2516(1) (Pet. Brief p. 5-6). The District Court "assumed," for purposes of the decision, that the memorandum was an authorization (Appendix p. 103, Note 3). The Court of Appeals made the same assumption (Pet. App. A, p. 7a). In view of the Court's holding that its sufficiency was immaterial to the decision, no hearing was held on the issue of whether Attorney General Mitchell himself (1) "reviewed the request and the facts and circumstances detailed therein," and (2) determined that probable cause existed, and (3) that normal investigative procedures reasonably appear to be unlikely to succeed if tried. See "Wilson Letters," (App. pp. 11-12, 50-51). In fact, Attorney General Mitchell in his affidavit (App. 93) does *not* state that he did any more than approve the requests.

It is apparent that the district judge who authorized the wiretaps relied upon the accuracy and integrity of the

court officers who appeared before him, and upon the written representations contained in the applications and their attachments. The Court had a right, under the statute, to know *who* made the important decision to seek authority to invade a citizen's privacy. Without the assurances that Will Wilson, the Assistant Attorney General in charge of the Criminal Division, had *personally* reviewed the file and determined that this *particular* case justified the intrusion proposed, the authorizing court may well have required a greater showing of need. Wilson's position, reputation, and integrity could have influenced the district judge in his action. So far as the district judge knew, the threshhold decision to authorize application was personally made by a responsible high-ranking Justice Department officer, "specially designated" by the Attorney General himself to act in his behalf, and who was aware of the policy considerations governing the extent and scope of such intrusions.

The government characterized this apparent difficulty as "at worst . . . [a] careless clerical dictating of form memoranda" (Government's Brief, *United States v. Giordano*, p. 71). It argues that since the lines of authority are clear (an assertion to which respondent does not accede) after the fact, or "ascertainable by interrogatories and testimony" (*Ibid*, p. 71), the confusion has been "easily resolved."

Courts must be able to trust the bald assertions of attorneys appearing before them. It should not be necessary to take "interrogatories" or "testimony" to determine the truth or falsity of representations made in applications for wiretap orders, search warrants, and the like. The applications in this case were not "inartful" or "confusing" but stated clearly and unequivocally that Will Wilson, pursuant to "special designation" authorized

by statute, had made the required determinations. This allegation was accepted at face value by the District Judge. It was not true. We know *now* that Will Wilson never even saw the application or the file, nor did he make any determinations as stated in his letter. (Affidavit, Appendix 85-86, 89-90).

It was this "guessing game" which the Court below condemned. Perhaps were this an adversary proceeding, subject to the challenge of opposing counsel, the truth could be ascertained through the hearing process before the important decision to order an interception was made. Where, however, the proceedings are *ex parte*, often under the most urgent of circumstances, courts justifiably depend upon the accuracy and reliability of the prosecuting officials. In this case, it is obvious that the reliance was misplaced.

While it is clear, as the Court below held, that the Congress and the public had a statutory right to be informed of the identity of the authorizing officer, the district court's right to know is imperative in our judicial system. Whether the deception was deliberate or unintentional, it had the effect of misleading the district judge, resulting in the entry of an order not in compliance with the requirements of Section 2518(1)(a) and (4)(d).

As an example of a similar approach in this very case, the government states that the determinations of probable cause and necessity made by the district judge were based upon sworn affidavits "whose accuracy and veracity is unchallenged" (Pet. Brief, p. 8).

The trial judge did not reach the pending motions[1] (R. 159-197) attacking the sufficiency of the affidavits

[1] The trial court treated the authorization question first, and did not proceed to examine the other issues raised in the suppression motion.

and failure to minimize, since the preliminary authorization procedure was found defective. This issue, then is not before this Court nor was it before the Court of appeals. This does not mean, however, that the "accuracy and veracity [of the affidavits] is unchallenged."

The affidavits were attacked on the grounds that:

1. They failed to demonstrate a need for wiretapping (R. 178);

2. They failed to particularly describe the communications sought to be intercepted (R. 182);

3. They failed to show adequate probable cause to support the order, since (R. 183);

a. Records were illegally obtained (R. 184);

b. Reliability of anonymous informants was not shown (R. 185);

c. The time of receipt of certain information was not shown (R. 186);

d. Most of the information was too "stale" to support probable cause (R. 187);

While technically, at this posture of the case, the "accuracy and veracity" of the affidavits is "unchallenged," their sufficiency is certainly under attack. Additionally, had a hearing been held upon that aspect of the motion to suppress, an attack upon the accuracy would have been made (R. 330). To broadly state that the orders were based upon "unchallenged" affidavits is certainly misleading.

If the determination by the district judge to authorize the wiretaps was based upon the erroneous assumption that the strict statutory requirements had been complied with, it is difficult to see how such findings overcame the faulty premise underlying them. This is the same "bootstrap technique" rejected by the Court of Appeals in

Giordano, Pet. App. A, p. 18a, and in the companion case to *Chavez, United States v. King*, No. 72-1320, pending, *King* Pet. App. A, p. 28 (Reported at 478 F.2d 494).

CONCLUSION

The threat of suppression is the statutory sanction for non-compliance with the strict provisions of Title III, to implement a Congressional policy limiting wiretapping to carefully circumscribed conditions. It reflects the "deep-seated uneasiness and apprehension that this capability [to wiretap] will be used to intrude upon cherished privacy of law abiding citizens." *United States v. United States District Court*, 407 U.S. 297 (1972). The decision below is correct, and should stand.

Dated: September 24, 1973

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* CHAVEZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–1319. Argued January 8, 1974—Decided May 13, 1974

Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 each application for a court order authorizing the interception of a wire or oral communication, 18 U. S. C. § 2518 (1) (a), and each interception order, 18 U. S. C. § 2518 (4) (d), must identify the officer authorizing the application, and the Attorney General, or an Assistant Attorney General specially designated by him, may authorize the application, 18 U. S. C. § 2516 (1). The contents of intercepted communications, or evidence derived therefrom, may not be received in evidence at a trial if the disclosure of the information would be "in violation of" Title III, 18 U. S. C. § 2515, and may be suppressed on the grounds, *inter alia*, that the communication was "unlawfully intercepted," 18 U. S. C. § 2518 (10) (a) (i), or that the interception order was "insufficient on its face," 18 U. S. C. § 2518 (10) (a) (ii). In this case the applications and orders to wiretap the telephones of respondents Chavez and Fernandez, two narcotics offense suspects, incorrectly identified an Assistant Attorney General as the official authorizing the applications, whereas with respect to Chavez it had been the Attorney General and with respect to Fernandez the Attorney General's Executive Assistant. After Chavez, Fernandez, and the other respondents were indicted, the District Court, on respondents' motions, held that the evidence secured through both wiretaps had to be suppressed for failure of the applications or orders to identify the individual who actually authorized the application, and further as to the Fernandez wiretap because neither the Attorney General nor a specially designated Assistant Attorney General authorized the application. The Court of Appeals affirmed in all respects. *Held:*

Syllabus

1. Because the application for the interception order on the Fernandez phone was authorized by the Attorney General's Executive Assistant, rather than by the Attorney General or any specially designated Assistant Attorney General, on whom alone § 2516 (1) confers such power, evidence secured under that order was properly suppressed. *United States* v. *Giordano*, *ante*, p. —. Pp. 6–7.

2. Misidentifying the Assistant Attorney General as the official authorizing the Chavez wiretap, when the Attorney General himself actually gave the approval, was in no sense the omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III, and hence does not require suppression of the wiretap evidence. *United States* v. *Giordano*, *supra*, distinguished. Pp. 7–17.

(a) Where it is established that responsibility for approval of the application is fixed in the Attorney General, compliance with the screening requirements of Title III is assured, and there is no justification for suppression. Pp. 9–10.

(b) The interception order was not "insufficient on its face" within the meaning of § 2518 (10) (a) (ii), since the order clearly identified "on its face" the Assistant Attorney General as the person authorizing the application, he being a person who under § 2516 (1) could properly give such approval if specially designated to do so as the order recited, notwithstanding this was subsequently shown to be incorrect. Pp. 10–11.

(c) The misidentification of the officer authorizing the wiretap application did not affect the fulfillment of any of the reviewing or approval functions required by Congress, and, by itself, does not render the interception conducted under the order "unlawful" within the meaning of § 2518 (10) (a) (i) or the disclosure of the content of the interceptions, or derivative evidence, otherwise "in violation of" Title III within the meaning of § 2515, there being no legislative history concerning §§ 2518 (1) (a) and (4) (d) to suggest that they were meant, by themselves, to occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance. Pp. 11–17.

478 F. 2d 512, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, STEWART, and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 72–1319

United States, Petitioner, v. Umberto Jose Chavez et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 13, 1974]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case, like *United States* v. *Giordano, ante*, p. —, concerns the validity of procedures followed by the Justice Department in obtaining judicial approval to intercept wire communications under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 211–225, 18 U. S. C. §§ 2510–2520, and the propriety of suppressing evidence gathered from court-authorized wiretaps where the statutory application procedures have not been fully satisfied. As is more fully described in *Giordano*, Title III limits who, among federal officials, may approve submission of a wiretap application to the appropriate District Court, to the Attorney General or an Assistant Attorney General he specially designates, 18 U. S. C. § 2516 (1), and delineates the information each application must contain, upon what findings an interception order may be granted, and what the order shall specify, 18 U. S. C. § 2518 (1), (3), (4).[1] Within this general framework, two statutory requirements are of particular relevance to this case. Section 2518 (1)(a)

[1] The relevant statutory provisions are set forth in the Appendix to *United States* v. *Giordano, supra*.

provides that each application for a court order authorizing or approving the interception of a wire or oral communication shall include, among other information, "the identity of the . . . officer authorizing the application." Similarly, § 2518 (4)(d) provides that the order of authorization or approval itself shall specify, in part, "the identity of . . . the person authorizing the application." The specific question for adjudication here, which it was unnecessary to resolve in *Giordano*, is whether, when the Attorney General has in fact authorized the application to be made, but the application and the court order incorrectly identify an Assistant Attorney General as the authorizing official, evidence obtained under the order must be suppressed. We hold that Title III does not mandate suppression under these circumstances.

I

Respondents were all indicted for conspiracy to import and distribute heroin in violation of 21 U. S. C. §§ 173, 174. In addition, respondent Umberto Chavez was separately charged under 18 U. S. C. § 1952 with using and causing others to use a telephone between California and Mexico, and performing other acts, in order to facilitate unlawful narcotics activity, and respondent James Fernandez was charged under § 1952 with traveling betwen California and Mexico, and performing other acts, for the same purpose. Upon notification that the Government intended to introduce evidence obtained from wiretaps of Chavez' and Fernandez' phones at trial, respondents filed motions to suppress, challenging the legality of the Justice Department's application procedures leading to the issuance by the District Court of the two orders permitting the wire interceptions. Affidavits filed in opposition by the former Attorney General and his

Executive Assistant represented that the application submitted for the February 18, 1971 order authorizing interception of wire communications to and from the Chavez phone had been personally approved by the Attorney General, whereas the application for the February 25, 1971 order to intercept communications to and from the Fernandez phone had been approved by his Executive Assistant at a time when the Attorney General was unavailable, and pursuant to an understanding that the Executive Assistant, applying the Attorney General's standards as he understood them, could act for the Attorney General in such circumstances.

Each application to the court had recited, however, that the Attorney General, pursuant to 18 U. S. C. § 2516, had "specially designated" the Assistant Attorney General for the Criminal Division, Will Wilson, "to authorize [the applicant attorney] to make this application for an Order authorizing the interception of wire communications." Moreover, appended to each application was a form letter, addressed to the attorney making the application and purportedly signed by Will Wilson, stating that the signator had reviewed the attorney's request for authorization to apply for a wiretap order pursuant to 18 U. S. C. § 2518 and had made the requisite probable cause and other statutory determinations from the "facts and circumstances detailed" in the request, and that "you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General . . . , pursuant to the power conferred on him by Section 2516 . . . to make application" for a wire interception order. Correspondingly, the District Court's intercept order in each case declared that court approval was given "pursuant to the application authorized by . . . Will Wilson, who has been specially designated in this proceeding by the Attorney General . . . John N.

Mitchell, to exercise the powers conferred on the Attorney General" by § 2516.

The discrepancy between who had actually authorized the respective applications to be made, and the information transmitted to the District Court clearly indicating that Assistant Attorney General Wilson was the authorizing official, was explained as the result of a standard procedure followed within the Justice Department. While the Attorney General had apparently refrained from designating any Assistant Attorney General to exercise the authorization power under § 2516 (1), form memoranda were routinely sent from his office, over his initials, to Assistant Attorney General Wilson, stating that "with regard to your recommendation that authorization be given" to make application for a court order permitting wire interception, "you are hereby specially designated" to exercise the power conferred on the Attorney General by § 2516 "for the purpose of authorizing" the applicant attorney to apply for a wiretap order. Evidently, this form was intended to reflect notice of approval by the Attorney General, though on its face it suggested that the decision whether to authorize the particular wiretap application would be made by Assistant Attorney General Wilson. In fact, as revealed by the affidavits of Wilson's then Deputy Assistants filed in opposition to respondents' suppression motions, "Wilson did not examine the files or expressly authorize the applications" for either the February 18 or February 25 interception orders, and they signed his name "in accordance with [his] authorization . . . and the standard procedures of the Criminal Division" to the respective letters of authorization to the applicant attorney, which were made exhibits to the applications. The signing of Wilson's name was regarded as a "ministerial act" because of Wilson's authorization to his Deputies "to sign his name to and dispatch such a letter of authorization

in every instance in which the request had been favorably acted upon in the Office of the Attorney General."

The District Court held that the evidence secured through both wiretaps had to be suppressed for failure of either of the individuals who actually authorized the applications to be "identified to Chief Judge Carter, Congress or the public" in the application or orders, as mandated by §§ 2518 (1)(a) and (4)(d), respectively. Moreover, evidence obtained under the February 25 wiretap order on the Fernandez phone was separately suppressed, because the Government admitted that "neither the Attorney General nor a specially designated Assistant Attorney General ever authorized the application[,]" as § 2516 (1) requires.

The Court of Appeals affirmed in all respects. 478 F. 2d 512. With respect to the Chavez tap, the Court of Appeals assumed, as had the District Court, that the Attorney General had personally approved the request for authority to apply for the interception order, as his affidavit stated. Nonetheless, the misidentification of Assistant Attorney General Wilson as the authorizing official was deemed to be a "misrepresentation" and an "apparently deliberate deception of the courts by the highest law officers in the land," *id.*, at 515, 517, which required suppression of evidence gathered from the tap for failure to comply with 18 U. S. C. §§ 2518 (1)(a) and (4)(d). Congress was held to have "intended to eliminate any possibility that the authorization of wiretap applications would be institutional decisions[,]" and the Court of Appeals was fearful that if the misidentification which occurred in this case were approved, "there would be nothing to prevent future Attorneys General from remaining silent if a particular wiretap proved embarrassing." *Id.*, at 516.

We granted certiorari, 412 U. S. 905, to resolve the conflict between the position taken by the Ninth Circuit

in this case on the issue of suppression because of inaccurate identification of the officer authorizing the application and the position taken by every other circuit that has considered the question.[2] We agree with those other courts of appeals that misidentifying the Assistant Attorney General as the official authorizing the wiretap application to be made does not require suppression of wiretap evidence when the Attorney General himself has actually given the approval; hence, we reverse that portion of the judgment suppressing the Chavez wiretap evidence, and remand for further proceedings to permit the District Court to address other challenges to the Chavez wiretap evidence which respondents had made but the District Court did not find it necessary to consider.[3] Because

[2] In other instances where the Attorney General had personally authorized the application, but the application and order erroneously recited approval by Assistant Attorney General Wilson, suppression of wiretap evidence has been denied on the ground of substantial compliance with Title III requirements. *United States* v. *James*, — U. S. App. D. C. —, — F. 2d — (1974) (Slip op., at 15–16) ("immaterial variance"); *United States* v. *Pisacano*, 459 F. 2d 259, 264 n. 5 (CA2 1972) ("discrepancy did not meaningfully subvert the congressional scheme"); *United States* v. *Becker*, 461 F. 2d 230, 235 (CA2 1972) ("harmless error"); *United States* v. *Ceraso*, 467 F. 2d 647, 652 (CA3 1972) ("subsequent identification of the authorizing officer is satisfactory"); *United States* v. *Bobo*, 477 F. 2d 974, 985 (CA4 1973) ("sufficient compliance"); *United States* v. *Cox*, 462 F. 2d 1293, 1300 (CA8 1972) ("it is irrelevant that the application and order recited the authorizing officer as Mr. Wilson rather than Mr. Mitchell"). See also *United States* v. *Roberts*, 477 F. 2d 57, 59 (CA7 1973), holding the authorization improper because given by the Executive Assistant, not the Attorney General, but suggesting that with respect to the misidentification of Assistant Attorney General Wilson "we would not be inclined to elevate form over substance to find a violation of 18 U. S. C. § 2518 (1)(a) and (4)(d) . . . ."

[3] The record discloses that respondents also based their motions to suppress the Chavez wiretap evidence on the failure of the Government's affidavits in support of the wiretap application to demon-

the application for the interception order on the Fernandez phone was authorized by the Attorney General's Executive Assistant, rather than by the Attorney General or any specially designated Assistant Attorney General, on whom alone 18 U. S. C. § 2516 (1) confers such power, evidence secured under that order was properly suppressed for the reasons stated in the opinion filed today in *United States* v. *Giordano, ante,* p. —. Accordingly, that portion of the judgment suppressing the Fernandez wiretap evidence is affirmed.

II

The application and order for the Chavez wiretap did not correctly identify the individual authorizing the application, as 18 U. S. C. §§ 2518 (1)(a) and (4)(d) require. Of this there is no doubt. But it does not follow that because of this deficiency in reporting, evidence obtained pursuant to the order may not be used at a trial of respondents. There is no claim of any constitutional infirmity arising from this defect, nor would there be any merit to such a claim, and we must look to the statutory scheme to determine if Congress has provided that suppression is required for this particular procedural error.

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strate a need for wiretapping as opposed to less intrusive means of investigation, 18 U. S. C. § 2518 (1)(c), to particularly describe the communications sought to be intercepted, § 2518 (1)(b)(iii), to allege facts sufficient to justify the uncertainty of the termination date for the interception, § 2518 (1)(d), or to adequately show probable cause to support the order, § 2518 (3); moreover, the sufficiency of the order's directive to minimize the interception of innocent conversations and compliance by the agents who conducted the wiretap with the order of minimization, § 2518 (5), were also challenged. R. 159–197. None of these questions is before us now, as neither the District Court nor the Court of Appeals passed on any of them.

Section 2515 of the Act provides that the contents of any intercepted wire or oral communication, and any derivative evidence, may not be used at a criminal trial, or in certain other proceedings, "if the disclosure of that information would be in violation of this chapter." Aggrieved persons may move, in a timely manner under § 2518 (10)(a), to suppress the use of such evidence at trial on the grounds that:

> "(i) the communication was unlawfully intercepted;
>
> "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> "(iii) the interception was not made in conformity with the order of authorization or approval."

In *United States* v. *Giordano*, *supra*, we have concluded that Congress, in 18 U. S. C. § 2516 (1), made preliminary approval of submission of wiretap applications a central safeguard in preventing abuse of this means of investigative surveillance, and intentionally restricted the category of federal officials who could give such approval to only the Attorney General himself or any Assistant Attorney General he might specially designate for that purpose. Hence, failure to secure approval of one of these specified individuals prior to making application for judicial authority to wiretap renders the court authority invalid and the interception of communications pursuant to that authority "unlawful" within the meaning of 18 U. S. C. § 2518 (10)(a)(i). Failure to correctly report the identity of the person authorizing the application, however, when in fact the Attorney General has given the required preliminary approval to submit the application, does not represent a similar failure to follow Title III's precautions against the unwarranted use of wiretapping or electronic surveillance and does not warrant

the suppression of evidence gathered pursuant to a court order resting upon the application.

There is little question that §§ 2518 (1)(a) and (4)(d) were intended to make clear who bore the responsibility for approval of the submission of a particular wiretap application. Thus, the Senate Report accompanying the favorable recommendation of Title III states that § 2518 (1)(a) "requires the identity of the person who makes, and the person who authorized the application[,] to be set out. This fixes responsibility." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968). And § 2518 (4)(d) "requires that the order note the agency authorized to make the interception and the person who authorized the application so that responsibility will be fixed." *Id.*, at 103. Where it is established that responsibility for approval of the application is fixed in the Attorney General, however, compliance with the screening requirements of Title III is assured, and there is no justification for suppression.

Respondents suggest that the misidentification of Assistant Attorney General Wilson as the authorizing official was calculated to mislead the District Court in considering the wire interception applications, and certainly had the effect of misleading him, since the interception order also misidentified the authorizing official in reliance on the statements made in the application. We do not perceive any purpose to be served by deliberate misrepresentation by the Government in these circumstances. To the contrary, we think it cannot be seriously contended that had the Attorney General been identified as the person authorizing the application, rather than his subordinate, Assistant Attorney General Wilson, the district judge would have had any greater hesitation in issuing the interception order. The same could not be said, of course, if, as in *Giordano*, the correct information had revealed that none of the indi-

viduals in whom Congress reposed the responsibility for authorizing interception applications had satisfied this preliminary step. The District Court undoubtedly thought that Wilson had approved the Chavez and Fernandez wiretap applications, and we do not condone the Justice Department's failure to comply in full with the reporting procedures Congress has established to assure that its more substantive safeguards are followed.[4] But we cannot say that misidentification was in any sense the omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III.

Neither the District Court nor the Court of Appeals made clear which of the grounds set forth in § 2518 (10)(a) was relied upon to suppress the Chavez wiretap evidence. Respondents rely on each of the first two grounds, *i. e.*, that the communications were "unlawfully intercepted" and that the Chavez interception order is "insufficient on its face." Support for the latter claim is drawn from the District Court decision in *United States* v. *Focarile*, 340 F. Supp. 1033, 1057–1060 (Md.), aff'd on other grounds *sub nom. United States* v. *Giordano*, 469 F. 2d 522 (CA4 1972), aff'd, *ante*, p. — (1974), which concluded that an order incorrectly identifying who authorized the application is equivalent to an order failing to identify anyone at all as the authorizing official. We find neither of these contentions persuasive.

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[4] The Government advises that in the spring of 1972 it revised the form memoranda by which the Attorney General had approved applications for wiretapping or electronic surveillance authority, and the form language in the letters sent to the applying attorneys, which are appended to the applications filed in the district courts, to accurately reflect that approval was obtained from the Attorney General, rather than a specially designated Assistant, unless the latter happens to be the case. Brief for the United States in *United States* v. *Giordano*, *ante*, p. —, at 9.

Here, the interception order clearly identified "on its face" Assistant Attorney General Wilson as the person who authorized the application to be made. Under § 2516 (1), he properly could give such approval had he been specially designated to do so by the Attorney General, as the order recited. That this has subsequently been shown to be incorrect does not detract from the facial sufficiency of the order.[5] Moreover, even if we were to look behind the order despite the clear "on its face" language of § 2518 (10)(a)(ii), it appears that the Attorney General authorized the application, as he also had the power to do under § 2516 (1). In no realistic sense, therefore, can it be said that the order failed to identify an authorizing official who possessed statutory power to approve the making of the application.

The claim that communications to and from the Chavez phone were "unlawfully intercepted" is more plausible, but does not persuade us, given the purposes to be served by the identification requirements and their place in the statutory scheme of regulation. Though

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[5] Respondents' attempt to analogize the facial insufficiency of a search warrant supported by an affidavit submitted under a false name of the affiant, a deficiency which has been held by some courts to require suppression under Fed. Rule Crim. Proc. 41, *King* v. *United States*, 282 F. 2d 398 (CA4 1960), or under the Fourth Amendment, *United States ex rel. Pugh* v. *Pate*, 401 F. 2d 6 (CA7 1968), cert. denied, 394 U. S. 999 (1969), to the asserted facial insufficiency of a wire interception order which incorrectly identifies who authorized the application for the order, must fail. Without passing on the soundness of these cases, it must be recalled that the misidentification of the officer authorizing a wiretap application is irrelevant to the issue of probable cause, which is supported by the separate affidavits of investigative officials. See 18 U. S. C. §§ 2518 (1) and (3). Moreover, no basis is provided in Title III for challenging the validity of the interception order depending on whether the application was approved by the Attorney General rather than a specially designated Assistant.

we rejected, in *Giordano*, the Government's claim that Congress intended "unlawfully intercepted" communications to mean only those intercepted in violation of constitutional requirements, we did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications "unlawful." To establish such a rule would be at odds with the statute itself. Under § 2515, suppression is not mandated for every violation of Title III, but only if "disclosure" of the contents of intercepted communications, or derivative evidence, would be in violation of Title III. Moreover, as we suggested in *Giordano*, it is apparent from the scheme of the section that paragraph (i) was not intended to reach every failure to follow statutory procedures, else paragraphs (ii) and (iii) would be drained of meaning. *Giordano* holds that paragraph (i) does include any "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Ante*, p. —.

In the present case, the misidentification of the officer authorizing the wiretap application did not affect the fulfillment of any of the reviewing or approval functions required by Congress and is not within the reach of paragraphs (ii) and (iii). Requiring identification of the authorizing official in the application facilitates the court's ability to conclude that the application has been properly approved under § 2516; requiring identification in the court's order also serves to "fix responsibility" for the source of preliminary approval. This information contained in the application and order further aids the judge in making reports required under

18 U. S. C. § 2519.[6] That section requires the judge who issues or denies an interception order to report his action and certain information about the application, in-

[6] Section 2519 provides in full:

"§ 2519. Reports concerning intercepted wire or oral communications.

"(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

"(a) the fact that an order or extension was applied for;

"(b) the kind of order or extension applied for;

"(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(e) the offense specified in the order or application, or extension of an order;

"(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

"(g) the nature of the facilities from which or the place where communications were to be intercepted.

"(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

"(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

"(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

cluding the "identity of . . . the person authorizing the application," within 30 days, to the Administrative Office of the United States Courts, § 2519 (1). An annual report of the authorizing officials designated in § 2516 must also be filed with that body, and is to contain the same information with respect to each application made as is required of the issuing or denying judge, § 2519 (2)(a). Finally, a summary of the information filed by the judges acting on applications and the prosecutors approving their submission is to be filed with Congress in April of each year by the Administrative Office, § 2519 (3). The purpose of these reports is "to form the basis for a public evaluation" of the operation of Title III and to "assure the community that the system of court-order [sic] electronic surveillance . . . is properly administered . . . ." S. Rep. No. 1097, 90th Cong., 2d Sess., at 107. While adherence to the identi-

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"(d) the number of trials resulting from such interceptions;

"(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

"(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

"(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

"(3) In April of each year the Director of the Administrative Office of the United States Court shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such reports shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section."

fication reporting requirements of §§ 2518 (1)(a) and (4)(d) thus can simplify the assurance that those who Title III makes responsible for determining when and how wiretapping and electronic surveillance should be conducted have fulfilled their roles in each case, they do not establish a substantive role to be played in the regulatory system.

Nor is there any legislative history concerning these sections, as there is, for example, concerning § 2516 (1), see *United States* v. *Giordano*, *supra*, at —, to suggest that they were meant, by themselves, to occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance. Though legislation to regulate the interception of wire and oral communications had been considered by Congress earlier, the proposed statute drafted for the President's Commission on Law Enforcement and Administration of Justice appears to have been the first published proposal to contain a requirement that the application for interception authority should specify "who authorized the application." Task Force Report: Organized Crime, Appendix C, at 109, § 3803 (a)(1) (1967). That proposed bill, which was substantially followed in Title III, also provided for reports like those now required by 18 U. S. C. § 2519, including information on "the identity of . . . who authorized the application." *Id.*, at 111, §§ 3804 (a)(6) and (b)(1). It did not, however, require the order to contain this information. *Id.*, at 110, § 3803 (e). S. 675, a bill introduced by Senator McClellan on January 25, 1967, as the "Federal Wire Interception Act," 113 Cong. Rec. 1491, did not contain any of these identification requirements. Hearings before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, Controlling Crime Through More Effective Law Enforcement, 90th Cong., 1st Sess.,

March 7, 8, 9; April 18, 19, 20; May 9; July 10, 11, 12, 1967, at 77–78, §§ 8 (a), (d), 9 (a). S. 2050, however, a proposal by Senator Hruska to regulate both wiretapping and electronic surveillance, did. Section 2518 (a)(1) required an interception application to include "the identity of the person who authorized the application," and §§ 2519 (a)(6) and (b)(1) provided that judges and authorizing prosecutors report "the identity of . . . who authorized the application," but did not require that the order contain this information, § 2518 (e). *Id.*, at 1006–1008. The requirement that this information be contained in the order, as well as in the application and required reports, first appeared in § 2518 (e)(4) of H. R. 13482, 90th Cong., 2d Sess. (1967). Though the House never reported out of committee any wiretapping bill, it was retained in S. 917, a combination of S. 675 and S. 2050, whose provisions ultimately were enacted as Title III. Despite the appearance and modification of the identification requirements during the legislative process, however, no real debate surrounded their adoption, and only the statements in S. Rep. No. 1097, *supra*, that they were designed to fix responsibility, give any indication of their purpose in the overall scheme of Title III. No role more significant than a reporting function designed to establish on paper that one of the major procedural protections of Title III had been properly accomplished is apparent.

When it is clearly established, therefore, that authorization of submission of a wiretap or electronic surveillance application has been given by the Attorney General himself, but the application, and, as a result, the interception order, incorrectly state that approval has instead been given by a specially designated Assistant Attorney General, the misidentification, by itself, will not render interceptions conducted under the order

"unlawful" within the meaning of § 2518 (10)(a)(i) or the disclosure of the contents of intercepted communications, or derivative evidence, otherwise "in violation of" Title III within the meaning of § 2515. Hence, the suppression of the Chavez wiretap evidence on the basis of the misidentification of Assistant Attorney General Wilson as the authorizing official was in error. Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought.

The judgment of the Court of Appeals is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 72–1319 AND 72–1057

United States, Petitioner, 72–1319 v. Umberto Jose Chavez et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 72–1057 v. Dominic Nicholas Giordano et al.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May 13, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL concur, concurring in part and dissenting in part in 72–1319, *United States* v. *Chavez*, and joining in 72–1057, *United States* v. *Giordano*.

The Court deals with two different Justice Department violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which imposes express limitations on the use of electronic surveillance. In *United States* v. *Giordano*, 72–1057, the Court correctly finds that the violation of 18 U. S. C. § 2516 (1) is a violation of a statutory requirement which "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." The Court also properly finds that a violation of such a statutory requirement mandates suppression of the evidence seized by the unlawful interception. I join the opinion of the Court in *Giordano*. The same violation of § 2516 (1) is also involved in the Fernandez wiretap in *United States* v. *Chavez*, 72–1319, and I therefore concur in the Court's suppression of the

evidence seized in that wiretap. In *Chavez*, however, the Court finds that suppression is not warranted for the violations of 18 U. S. C. §§ 2518 (1)(a) and 2518 (4)(d) which the Court admits occurred in the Chavez wiretap itself. I dissent from this conclusion, hereinafter referred to as the holding of *Chavez*.

I

Title III permits electronic surveillance to be employed only pursuant to a court order. It requires, *inter alia*, that a federal trial attorney desiring to apply to the District Court for such a wiretap order must first secure authorization from one of a group of specified officials in the Justice Department. *Giordano* represents a class of cases in which authorization for electronic surveillance was given by Sol Lindenbaum, the Executive Assistant to Attorney General John Mitchell, in violation of the "authorization requirement" of § 2516 (1) of Title III. This section provides that a wiretap order may be applied for only after authorization by "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General." 18 U. S. C. § 2516 (1). *Chavez*, on the other hand, represents a class of cases where the Justice Department violated the "identification requirement" of § 2518 (1)(a) of Title III, which requires that each application made to the District Court for a wiretap order "shall include . . . the identity of . . . the officer authorizing the application." *Id.*, § 2518 (1)(a). Because the District Courts in this class of cases were supplied with misinformation as to the identity of the person who authorized the applications made to them, the orders they entered approving the use of electronic surveillance violated § 2518 (4)(d) of Title III, which provides that *such orders "shall specify . . . the identity of . . . the person authorizing the application."*

In the Justice Department between 1969 and 1972, a request from a federal trial attorney for authorization to apply for a wiretap order was reviewed in the Criminal Division before being sent to Attorney General Mitchell. According to the Solicitor General, in *Chavez* Attorney General Mitchell made the operative decision to authorize the wiretap application and signified this by sending a memorandum to Assistant Attorney General Will Wilson directing Wilson to authorize the trial attorney to submit the application to the District Court. The memorandum,[1] the Solicitor General admits, does not make clear that the operative decision was made in the Attorney General's Office; rather, it indicates that Wilson himself was designated to review and authorize the application.

At this point, a letter of authorization was sent to the trial attorney, which clearly identified Assistant Attorney General Wilson, and not Mitchell, as the person who had made the operative decision to authorize the wiretap.[2] Wilson, however, neither saw nor authorized

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[1] The form memorandum employed by Mitchell stated in part:

"This is with regard to your recommendation that authorization be given to [the particular trial attorney] to make application for an Order of the Court under Title 18, United States Code, Section 2518 permitting the interception of wire communications for a [particular] period to and from telephone number [the listed telephone numbers of the particular criminal investigation] . . . .

"Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, *you are hereby specially designated to exercise those powers for the purpose of authorizing* [the particular trial attorney] to make the above-described application." (Emphasis added.)

[2] The letter sent over Wilson's signature in *Chavez* read:

"This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Bureau of Narcotics and Dangerous Drugs and the Bureau of Cus-

the Chavez wiretap application or any others; his signature was affixed to the authorization letters by a Deputy Assistant Attorney General, either Harold P. Shapiro or Henry E. Petersen.[3]

When the trial attorney applied for a wiretap order in the District Court, he attached the letter of authorization purportedly signed by Wilson, and naturally misidentified Wilson as the person who had authorized the application to be made,[4] in violation of the identification requirement of § 2518 (1)(a), *supra*. As a result, the District Court's order identified Wilson, and not Mitchell, as the Justice Department official who had authorized

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toms [to intercept wire communications at the particular number involved] . . . .

"*I have reviewed your request and the facts and circumstances detailed therein and have determined that there exists probable cause to believe* that [named individuals were committing certain offenses] . . . . *I have further determined* that there exists probable cause to believe that the above persons make use of the described facility in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures reasonably appear unlikely to succeed if tried."

"Accordingly, *you are hereby authorized under the power specially delegated to me* in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to Section 2518 of Title 18, United States Code [to intercept the described wire communications] . . . ." (Emphasis added.)

[3] In *Chavez*, the letter was signed by Petersen.

[4] The application stated:

". . . [T]he Honorable John N. Mitchell, has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, The Honorable Will Wilson, to authorize affiant to make this application for an Order authorizing the interception of wire communications. This letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A."

the trial attorney to apply for the Chavez wiretap order,[5] in violation of the identification requirement of § 2518 (4)(d), *supra*.

In *Chavez*, Mitchell first acknowledged responsibility for authorizing the wiretap application in an affidavit filed with the District Court only after respondents had made a motion to suppress the evidence in the tap. Similar affidavits stating that Mitchell had authorized the application, rather than Wilson, were filed by Lindenbaum and Petersen. The courts below, on the strength of these affidavits, have held that Mitchell did in fact authorize the application to be made. Both, however, ordered the evidence which was seized by the surveillance to be suppressed, since the application misidentified Wilson as the responsible official. This Court reverses the Court af Appeals.

II

Deciding a question not reached in *Giordano*, the Court in *Chavez* holds that suppression is not dictated when there has been a violation of a provision of Title III which does not, in the view of the courts, "directly and substantially implement the congressional intention to limit the use of intercept procedures" to cases clearly calling for electronic surveillance. I cannot agree that Title III, fairly read, authorizes the courts to pick and choose among various statutory provisions, suppressing evidence only when they determine that a provision is "substantive," "central," or "directly and substantially" related to the congressional scheme.

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[5] The order read in part:

"Special Agents . . . are authorized, pursuant to the application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, [to intercept wire communications] . . . ."

Section 2515 of Title III unambiguously provides that no evidence derived from any intercepted communication may be received "in any trial . . . in or before any court . . . if the disclosure of that information would be in violation of this chapter." The Court acknowledges this provision in *Chavez, ante,* at 12, but disregards two sections of Title III explicitly dealing with disclosure in determining when disclosure is in fact "in violation of" Title III. Section 2511 (1), which provides criminal penalties for willful violations of Title III, prohibits in § 2511 (1)(c) knowing disclosure of communications intercepted in violation of the subsection, and the subsection prohibits interception "[e]xcept as otherwise specifically provided in this chapter." 18 U. S. C. § 2511 (1)(a). Section 2517 (3) authorizes the disclosure in a criminal proceeding of information received "by any means authorized by this chapter" or of evidence derived from a communication "intercepted in accordance with the provisions of this chapter." The statute does not distinguish between the various provisions of the Title, and it seems evident that disclosure is "in violation of" Title III when there has not been compliance with any of its requirements.

The Court fixes on § 2518 (10)(a), which defines the class of persons who may move to suppress the admission of evidence. This section provides that any aggrieved person may move to suppress evidence on the grounds that:

> "(i) the communication was unlawfully intercepted;
>
> "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face;
>
> "(iii) the interception was not made in conformity with the order of authorization or approval."

Since (ii) and (iii) reach some statutory violations,

reasons the Court, (i) cannot reach all statutory violations or else (ii) and (iii) would be "drained of meaning."

The choice seems to be between attributing to Congress a degree of excessive cautiousness which led to some redundancy in drafting the protective provisions of § 2518 (10)(a), or foolishness which led Congress to enact statutory provisions for law enforcement officials to scurry about satisfying when it did not consider the provisions significant enough to enforce by suppression. In view of the express prohibition by §2515 of disclosure of information "in violation of" the chapter, I would opt for the conclusion that Congress was excessively cautious, and that "unlawfully intercepted" means what it says.

Congress could easily have given the judiciary discretion to apply the suppression remedy only for violations of "central" statutory provisions by using language such as "unlawfully intercepted in violation of important requirements of this chapter" in § 2518 (10)(a). But no such limitation appears. Further, the legislative history of Title III emphasizes Congress' intent to enforce every provision of the Title with the remedy provided in §§ 2515 and 2518 (10)(a). The Senate Report which accompanied Title III to the Congress states that "Section 2515 . . . imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter," and that §2518 (10)(a) together with § 2515 "applies to suppress evidence directly . . . or indirectly obtained in violation of the chapter." S. Rep. No. 1097, 90th Cong., 1st Sess., 96 (1968).

Again, no distinction supports the conclusion that Congress considered any provision of Title III more important than any other in the applications of the suppression remedy. Congress at no point indicated that it intended to give the courts the discretion to distinguish various provisions of Title III, never suppressing evidence for violations of some—such as §§ 2518 (1)(a) and

(4)(d)—deemed not "directly and substantially" related to the congressional intent to limit the use of electronic surveillance. No matter how egregious or willful the violation of these provisions, it seems that suppression will not follow, and the Court opens the door to the creation of other non-"central" statutory requirements. This breadth of discretion is not part of the congressional scheme, and the Court oversteps its judicial role when it arrogates such discretion to itself.

III

Moreover, even under the test the Court defines in *Chavez*, that violations of only those statutory provisions "directly and substantially" limiting the use of electronic surveillance will warrant suppression, the violation of the identification requirements of §§ 2518 (1)(a) and (4)(d) mandates suppression in *Chavez*. For the requirement of § 2518 (1)(a) that the application for a wiretap "shall include . . . the identity of . . . the officer authorizing the application" together with that of § 2518 (4)(d) that the wiretap order contain the same information significantly implement the congressional intention to limit the use of electronic surveillance procedures.

In support of its conclusion that suppression is not mandated by the §§ 2518 (1)(a) and 2518 (4)(d) violations in *Chavez*, the Court states that while Congress expressed the intent that these provisions "fix responsibility" on the person who authorized the employment of electronic surveillance, "[w]here it is established that responsibility for approval of the application is fixed in the Attorney General, however, compliance with the screening requirements of Title III [§ 2516] is assured, and there is no justification for suppression." *Ante*, p. 9. To the Court, the provisions "do not establish a substantive role to be played in the regulatory system. . . . No role more significant than a reporting function designed

to establish on paper that one of the major procedural protections of Title III [the authorization requirement of § 2516] had been properly accomplished is apparent." *Ante*, pp. 15, 16.

The Court reduces the statement of Congress that the identification provisions were created to "fix responsibility" for a wiretap authorization to meaning only that the provisions were drafted to assure the courts that there had been compliance with the authorization requirement of § 2516. And the Court finds it satisfactory that this responsibility is established by an *ex post facto* affidavit of the Attorney General, stating that he in fact authorized the Chavez surveillance.

It seems to me a complete misreading of Congress' attempt to "fix responsibility" in the application and order to reach these conclusions. Sections 2518 (1)(a) and 2518 (4)(d) are not part of the detailed and stringent guidelines of Title III through legislative inadvertence. They were not present in early proposals to regulate wiretapping, but were carefully inserted in later proposals, culminating in the draft which became Title III. A 1961 proposal to allow wiretapping under regulated conditions did not contain any identification requirement, although it contained provisions designating those who could authorize surveillance.[6] S. 675, introduced to the 90th Congress by Senator McClellan on January 25, 1967, 113 Cong. Rec. 1491, did not require either the application or the court order to identify the person who authorized the surveillance application.[7] S. 2050, introduced five

[6] S. 1495, 87th Cong., 1st Sess., § 4 (b), printed in Hearings on Wiretapping and Eavesdropping Legislation before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., 4, 5 (1961).

[7] Printed in Hearings on Controlling Crime Through More Effective Law Enforcement before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., 75 (1967).

months later by Senator Hruska, 113 Cong. Rec. 18007, expressly required that the application to the court set forth "the identity of the person who authorized the application," but did not require the court order to contain this information.[8] H. R. 13482, introduced in the House on October 12, 1967, 113 Cong. Rec. 28792, not only required that the application identify the person authorizing it, but also that the court order contain this information. Six months later on April 29, 1968, the Senate Judiciary Committee reported S. 917, whose provisions ultimately were enacted as Title III, accompanying the bill with an extended report explaining every provision.[9] Though it noted that Title III is "essentially a combination" of S. 675 and S. 2050,[10] the Judiciary Committee went beyond either of those bills as to the identification requirements, mandating that both the application and the order identify the person who authorized the application.

In its discussion of the authorization requirement of § 2516, the Senate Report states:

> "This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen." S. Rep. No. 1097, 90th Cong., 1st Sess., 97.

But this alone was not sufficient. The Report continues:

> "The application must be made to a Federal judge

[8] Printed in *id.*, 1006.

[9] S. Rep. No. 1097, 90th Cong., 1st Sess. (1968).

[10] *Id.*, at 66.

of competent jurisdiction, as defined in section 2510 (9), discussed above. *The application must conform to section 2518, discussed below.*" *Ibid.* (Emphasis added).

The Committee's discussion of § 2518 states:

"Section 2518 of the new chapter sets out in detail the procedure to be followed in the interception of wire or oral communications.

. . . . .

"Subparagraph [2518 (1)(a)] *requires* the identity of the person who makes, and the person who authorized the application to be set out. *This fixes responsibility.*

. . . . .

". . . Subparagraph [2518 (4)(d)] *requires* that the order note the agency authorized to make the interception and the person who authorized the application *so that responsibility will be fixed.*" *Id.*, at 100, 101, 103. (Emphasis added.)

The crucial concept is Congress' expression of intention that §§ 2518 (1)(a) and (4)(d) should be complied with, so that the application and order would fix responsibility.

Clearly, no such responsibility was fixed on Mitchell, the authorizing figure, in *Chavez*. As the Court of Appeals noted, *United States* v. *Chavez*, 478 F. 2d 512, 515, 516, there

"was a misrepresentation, in circumstantial and carefully phrased detail, all pointing to Wilson as the official authorizing the application, when in fact he did no such thing . . . . The Wilson letter and the Mitchell memorandum . . . create the illusion of compliance with the Act. Without Mitchell's affidavit, the lines of responsibility lead to Wilson, not to Mitchell."

Yet Wilson never saw the application for which Mitchell now accepts responsibility. Before the affidavits submitted to the District Court in response to the motion to suppress, about one year after the application was initially authorized, responsibility pointed directly at Wilson, and no document implicated Mitchell.

It is simply not enough that Mitchell's responsibility is established only after a prosecution is underway and a motion to suppress filed. After-the-fact acceptance for the Chavez surveillance was made at no cost. The surveillance was productive and was directed against an alleged drug trafficker, a pariah of society. Accepting responsibility at this point, further, helped Mitchell and the Justice Department avoid the acute embarrassment of losing this prosecution. But this was not the scheme created by the Congress. By creating the identification provisions, which required the authorizing official to be made known at the time of an application, it established a mechanism by which a person's responsibility was to be acknowledged immediately, not a device by which the identity of the person authorizing the application would remain hidden until it was discovered that an instance of electronic surveillance had been productive and not offensive to public sensibilities.

Immediate acknowledgment of responsibility for authorizing electronic surveillance is not an idle gesture. It lessens or eliminates the ability of officials to later disavow their responsibility for surveillance. By adding the identification provisions of § 2518, Congress took a step toward stripping from responsible officials the ability to choose after the fact whether to accept or deny that responsibility by coming forward and filing an affidavit. "Fixing" of responsibility in the application and order can have no other meaning; it simply does not comprehend a situation where responsibility is concealed or unsettled. Had Congress been content with compli-

ance with § 2516 being proven and responsibility for surveillance being established by later testimony and affidavits, it could easily have left the legislation in its early form without adding the express requirements of § 2518 (1)(a) and (4)(d) to the Act.[11]

The Court's treatment of the identification requirements trivializes Congress' efforts in adding them to Title III. In *Giordano*, the Court relies on Congress' clearly expressed desire that an official, responsible to the political process, should make the decision authorizing electronic surveillance and bear the scrutiny of Congress and the public for that decision. As noted, the Senate Report which accompanied Title III to Congress stated that § 2516 "centrallizes in a publicly responsible official subject to the political process" the formulation of electronic surveillance policy so that "[s]hould abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen." S. Rep. No. 1097, 90th Cong., 1st Sess., 97 (1968). Similarly, Senator Long, in support of the bill read from a report which stated "We agree that responsibility should be focused on those public officials who will be principally accountable to the courts and the public for their actions." [12] Speaking to a related provision requiring that politically responsible state prosecuting officials authorize state

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[11] The Court in *Chavez* finds some guidance in the fact that "no real debate surrounded" the adoption of the identification requirements. This is not surprising, in that the provisions were added to wiretapping legislation in committee, and justified in the Judiciary Committee's report.

[12] 113 Cong. Rec. 14474. The Report was by the Association of the Bar of the City of New York, Committee on Federal Legislation, Committee on Civil Rights, entitled "Proposed Legislation on Wiretapping and Eavesdropping after *Berger* v. *New York* and *Katz* v. *United States*."

applications, Professor Blakely of Notre Dame, instrumental in the drafting of Title III, stated:

> "Now, the reason [for this requirement] is that unless we involve someone in the process of using this equipment who is politically responsible, that is, someone who must return to the people periodically and be reelected, it seems to me we miss a significant check on possible abuse. As a practical matter, if there is police abuse, the remedies we can take against them are limited. If we involve the responsible judgment of a political official in the use of this equipment, and it is then abused, the people have a very quick and effective remedy at the next election." [13]

But it is clear that this personal responsibility and political accountability, relied on by Congress to check the reckless use of electronic surveillance, is rendered a mere chimera when the official actually authorizing a wiretap application is not identified until years after the tap has occurred, when he might already be out of office, when the usefulness of the tap is already established, when it is clear that the surveillance was not abusive, and then only through voluntary admissions or the sifting of potentially contradictory affidavits. Responsibility is hardly "focused," and the "lines of responsibility" are gossamer at best. This is why Congress added the demand that responsibility be immediately *fixed*. The procedures which the Court sanctions in *Chavez* stretch the unequivocally expressed desire of Congress to fix *responsibility* in the application and order well beyond the breaking point.

In eviscerating Congress' intent to fix responsibility in

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[13] Hearings on the Anti-Crime Program before Subcomm. No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 1380 (1967).

the application and order, the Court destroys a significant deterrent to reckless or needless electronic surveillance. It allows the official authorizing a wiretap to remain out of the harsh light of public scrutiny at the crucial beginning of the wiretap process, only to emerge later when he chooses to identify himself. Knowledge that personal responsibility would be immediately focused and immutably fixed, whatever the outcome of surveillance, be it profitable or profligate, successful or embarrassing, forces an official to be circumspect in initially authorizing an electronic invasion of privacy. This is why Title III requires more than a judicial determination of probable cause; it also requires an accountable political official to exercise political judgment, and it requires that the political official be immediately identified and his responsibility fixed when an application is filed. The identification procedures, by fixing responsibility, obviously serve to "limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device," thereby requiring suppression even under the test the Court adopts in *Chavez*.

IV

The Court mentions in passing the reporting requirements of Title III, noting the information furnished the judge pursuant to § 2518 (1)(a) is useful in making the reports required of him under § 2519. This section requires the judge to report, *inter alia*, the name of the party who authorized each wiretap application made to him to the Administrative Office of the United States Courts within 30 days after surveillance has been completed. 18 U. S. C. § 2519 (1)(f). At the same time, 18 U. S. C. 2519 (2) requires the authorizing prosecuting officials designated in § 2516 to file a report in January of each year, which also must include the name of the

person who authorized applications made during the previous calendar year. In reliance on this information, the Administrative Office is to report such information to the Congress for public scrutiny. *Id.*, § 2519 (3). Like the applications and wiretap orders themselves, this report is to include the names of those persons responsible for authorizing electronic surveillance.

In the set of cases represented by *Chavez*, of course, the person actually authorizing the applications, Mitchell, was not made known to the courts which approved them, and so the reports filed with the Administrative Office by the judiciary did not identify him as the responsible official. The potential for public accountability through this channel was foreclosed by the misinformation given the courts. While the report filed by the office of the Attorney General in January 1970 did state that the 1969 applications filed in Wilson's name had been personally approved by Mitchell, the Solicitor General informs us that the reports filed by the Attorney General regarding instances of electronic surveillance for 1970 and after, including the Giordano wiretap (1970) and the Chavez tap (1971), did not acknowledge that Mitchell had personally authorized the surveillance attributed to his subordinates.[14] The failure of the Attorney General's office to document the actual personal responsibility of Mitchell for surveillance authorizations occurred as those authorizations proliferated: there were only 34 instances of federal surveillance reported under Title III for 1969, but that number rose to 183 in 1970 and 238 in 1971.[15] *Ex post facto* acknowledgment of

[14] The Administrative Office, nonetheless, repeated the statement made for 1969 that Mitchell had "personally" authorized the applications.

[15] See Administrative Office of the United States Courts, Report

responsibility by Mitchell in the annual reports filed pursuant to § 2519 (2) could not of course cure the violation of the express congressional mandate of § 2518 (1)(a), any more than did Mitchell's filing of an affidavit. Nevertheless, not even these reports for years after 1969 provided documentation that Mitchell was the Justice Department official actually responsible for authorizing electronic surveillance. While Congress demanded the openness of political accountability, Justice Department documents drew a veil of secrecy, and no personal responsibility was attributed in any documents to Mitchell, the person actually responsible for authorizing the electronic surveillance.

V

As the Court recognized in *Gelbard* v. *United States*, 408 U. S. 41, 48, the protection of privacy was an overriding concern of Congress when it established the requirements of Title III in 1968:

> "The need for comprehensive, fair, and effective reform setting uniform standards is obvious. New protections for privacy must be enacted." S. Rep. No. 1097, 90th Cong., 1st Sess., 69.

Electronic surveillance was a serious political issue, and these detailed and comprehensive requirements are not portions of a hastily conceived piece of legislation. As noted above, electronic surveillance legislation was introduced long before 1968, and the provisions of Title III are the culmination of a long evolutionary process. The Title was accompanied by an exhaustive and studied report in which the Senate Judiciary Committee offered an explanation and justification for each clause of the bill.

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on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, 1969, 1970, 1971.

I cannot believe that Congress perversely required law enforcement officials to jump through statutory hoops it considered unnecessary to the goal of protecting individual privacy from unwarranted electronic invasions.

On the contrary, the history of Title III reflects a desire that its provisions be strictly construed. Senator McClellan, sponsor of S. 675, one of the bases for Title III, and chairman of the committee which reported Title III to Congress, stated during hearings on his bill:

> ". . . I would not want any loose administration of this law.
>
> . . . . . .
>
> "But have it very strictly observed. It is not to become a catchall for promiscuous use. I want to see this law strictly observed with the courts adhering to the spirit and intent of it in granting the orders.
>
> . . . . . .
>
> "I think it ought to be tight, very definitely as free from loopholes as it can possibly be made . . . ."[16]

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[16] Hearings on Controlling Crime Through More Effective Law Enforcement, before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., 508, 869. In addition, in reporting to the Senate in 1969 on the operation of Title III during its first year, Senator McClellan stated:

"I do, however, want to admonish every law enforcement officer, prosecutor, and judge involved in this area that the only way this legislation will be effective in combatting crime is by strict adherence to the standards it contains.

. . . . . .

". . . This is an invaluable and powerful tool that must not be subjected to abuse. Those who violate the standards can and must either be punished and if they cannot learn to follow the law they must face loss of this enforcement tool. . . .

. . . . . .

"Mr. President, my purpose in making these remarks has been to help assure that this legislation will be, in fact, followed to the

Subsequently, McClellan's committee closed yet another loophole in the law by inserting the identification requirements of Title III, attempting thereby to fix responsibility at the time of the application for a wiretap order, requirements which this Court now nullifies.

Mr. Justice Holmes observed in dissent 70 years ago that:

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exert a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400–401.

The Solicitor General reminds us that substantial effort on the part of the Organized Crime Section of the Criminal Division of the Department of Justice is implicated, for the violations of Title III reflected in these two cases are not isolated occurrences. The failure of Attorney General Mitchell properly to authorize applications involves 60 cases and 626 defendants. The failure of surveillance applications to fix responsibility on Mitchell, when he did in fact authorize the applications, involves an additional 99 cases and 807 defendants. Yet the magnitude of the effect of suppression of unlawfully

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strictest letter of the law—both bringing criminals to book and protecting citizens' privacy. That is the only way in which it can be utilized as an effective tool in reducing crime . . . . Let us make sure that none of those who may be convicted can ask for a reversal because the law was not strictly followed." 115 Cong. Rec. 23241–23242.

obtained evidence for these violations of Title III does not vitiate our duty to enforce the congressional scheme as written. The failure of a prosecution in a particular case pales in comparison with the duty of this Court to nourish and enhance respect for the evenhanded application of the law. I accordingly dissent in part in *Chevez*.